TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 825

ROSCOE IRWIN, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE FOURTEENTH DISTRICT OF NEW YORK, PETITIONER

vs.

E. PALMER GAVIT

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 18, 1925.
CERTIORARI GRANTED APRIL 14, 1925.

(30198)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 325

ROSCOE IRWIN, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE FOURTEENTH DISTRICT OF NEW YORK, PETITIONER

vs.

E. PALMER GAVIT

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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J43038

1 In United States District Court

For the Northern District of New York

E. PALMER GAVIT, PLAINTIFF
against
ROSCOE IRWIN, COLLECTOR OF INTERNAL REVENUE FOR the fourteenth district of New York, defendant } No. 418

Summons

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the honorable George W. Ray, judge of the said court, at the city of Utica, in the said Northern District of New York, the 4th day of June, in the year of our Lord one thousand nine hundred and seventeen.

[SEAL.] W. S. DOOLITTLE, *Clerk.*

NEILE F. TOWNER,
Plaintiff's Attorney.

Office and post office address, 13 North Pearl Street, Albany, New York.

2 In United States District Court

(Title omitted.)

Bill of complaint

The plaintiff for complaint herein alleges:

FOR A FIRST CAUSE OF ACTION

First. That at all the times hereinafter mentioned, plaintiff was and now is a citizen of the United States of America and a resident of the city of Albany, county of Albany, Northern District of New York.

Second. That at all the times hereinafter mentioned the defendant was and now is collector of internal revenue for the fourteenth district of New York and resided, and now resides, in said Northern District of New York.

Third. That on or about June 1st, 1915, plaintiff received from the defendant a notice of and a demand for a tax claimed to be

assessed upon his individual income for the period ending December 31st, 1913, demanding payment of said tax, together with a penalty imposed thereon on or before June 11th, 1915. That said notice further provided that if said tax was not in the hands of
3 defendant for deposit before the close of business on said date, it would be his duty, under the law, to collect the same, together with five per centum additional and interest at one per centum per month until paid. That said tax amounted to one hundred ninety-six dollars and fifty-eight cents ($196.58), and said penalty amounted to ninety-eight dollars and twenty-nine cents ($98.29). That a copy of said notice is hereto annexed, marked "Schedule A," and made a part hereof.

Fourth. Upon information and belief, that said income tax was based upon the return for the period ending December 31st, 1913, made and filed by plaintiff with the defendant on or about April 10th, 1915.

Fifth. That in filing his said return for the period ending December 31st, 1913, plaintiff made a specific claim that all sums received by him, which were designated in said return, from the estate of Anthony N. Brady, was a bequest and not income and not taxable, and duly protested against any tax being levied thereon. That the original return filed with defendant is hereby made a part hereof as though the same was set forth in full herein.

Sixth. That under the will of Anthony N. Brady, deceased, admitted to probate by the Surrogate of Albany County on August 12th, 1913, plaintiff received a specific bequest based on a certain fixed proportion of said estate and payable during a certain fixed period. That a copy of the portion of said will of Anthony N. Brady which contains the aforesaid bequest to plaintiff is hereto annexed, marked "Schedule B," and made a part hereof.

4 Seventh. That the amount received by plaintiff from the estate of Anthony N. Brady during the period ending December 31st, 1913, was a bequest and not income and not taxable as such within the provisions of the act of Congress, approved October 3rd, 1913.

Eighth. That deducting from plaintiff's income said amount received by plaintiff from the estate of Anthony N. Brady, as set forth in plaintiff's said income tax return for the period ending December 31st, 1913, referred to in paragraph or subdivision numbered "Fourth" of this first cause of action of the complaint, the balance of plaintiff's income was not taxable within the provisions of the said act of Congress, approved October 3rd, 1913.

Ninth. That on June 11th, 1915, plaintiff paid to defendant said tax amounting to one hundred ninety-six dollars and fifty-eight cents ($196.58) under protest and by compulsion and under duress, for the reason that in case of default in the payment thereof defendant threatened to enforce collection and impose a further penalty and that plaintiff had no means of immediate relief other than such payment, and plaintiff specifically notified defendant that he

made such payment by compulsion and under duress and without waiver of his rights to recover same, and further specifically objected to the assessment of said tax against him and the imposition of said penalty and protested against the payment of same for the reason that said tax was erroneously illegally and unlawfully assessed against him, in that said tax was based upon sums received by plaintiff during said period ending December 31st, 1913,
5 from the estate of Anthony N. Brady, which was a bequest and not income and therefore not taxable, that said tax was not a proper tax upon his income and was contrary to the letter and spirit of said act of Congress, approved October 3rd, 1913. That a copy of the written protest filed with the defendant at the time of making said payment is hereby referred to and made a part hereof as though the same was set forth in full herein.

Tenth. That at the time that said tax was paid plaintiff appealed to the United States Commissioner of Internal Revenue for the remission of said penalty imposed upon him, upon the ground that the amount received by him from the estate of Anthony N. Brady was a bequest and therefore not taxable, and for that reason no return of his income for the period ending December 31st, 1913, was made at the time the said return was due, namely, on or before March 1st, 1914. That as soon as plaintiff was advised that the said sum would not be regarded as income, he immediately made a return for the period ending December 31st, 1913, although he still claimed that such sum was a bequest and not taxable, and protested against any tax being levied thereon.

Eleventh. That thereafter said claim for the remission of said penalty was disallowed by said United States Commissioner of Internal Revenue, and on June 29th, 1915, plaintiff paid to defendant, under protest, said penalty of ninety-eight dollars and twenty-five cents ($98.25).

Twelfth. That on or about November 10th, 1916, and within two years after the collection by defendant from plaintiff of said tax and penalty, amounting to two hundred ninety-four dollars
6 and eighty-seven cents ($294.87), as aforesaid, plaintiff appealed to the United States Commissioner of Internal Revenue to refund said tax and penalty upon the ground that said tax was erroneously, wrongfully, and unlawfully assessed against him, in that said tax was based upon sums received by him during said year 1913 from the estate of Anthony N. Brady which was a bequest and not income, and, therefore, not taxable, and that said tax was not a tax upon his net income and was contrary to and against the letter and spirit of the act of October 3rd, 1913. That said claim for refund, duly filed, is hereby referred to and made a part hereof as though the same was set forth in full herein.

Thirteenth. Upon information and belief, that thereafter and on or about April 14th, 1917, said claim for refund was rejected by the United States Commissioner of Internal Revenue and notice of said rejection was given to plaintiff by defendant.

Fourteenth. That by reason of the foregoing there is lawfully due to plaintiff from the defendant the sum of two hundred ninety-four dollars and eighty-seven cents ($294.87), with interest on one hundred ninety-six dollars and fifty-eight cents ($198.58) from June 11th, 1915, and on ninety-eight dollars and twenty-nine cents ($98.29) from June 29th, 1915.

FOR A SECOND CAUSE OF ACTION

First. Repeats, realleges, and makes a part hereof all the allegations contained in paragraphs or subdivisions numbered "First" and "Second" of the first cause of action of the complaint herein.

7 Second. That on or about May 29th, 1916, plaintiff received from the defendant a notice of and a demand for an additional tax claimed to be assessed upon his individual income for the period ending December 31st, 1913, demanding payment of said additional tax, together with a penalty imposed thereon, on or before June 8th, 1916. That said notice further provided that if said additional tax was not in the hands of defendant for deposit before the close of business on said date, it would be his duty, under the law, to collect the same, together with five per centum additional and interest at one per centum per month until paid. That said tax amounted to two thousand ninety-seven dollars and eighty-two cents ($2,097.82), and said penalty to one thousand forty-eight dollars and ninety-one cents ($1,048.91). That a copy of said notice is hereto annexed, marked "Schedule C" and made a part hereof.

Third. Upon information and belief, that said additional income tax was based upon the amended return for the period ending December 31st, 1913, made and filed by plaintiff with the defendant on or about April 13th, 1916.

Fourth. That in filing his said amended return for the period ending December 31st, 1913, plaintiff made a specific claim that all sums received by him, which were designated in said amended return, from the estate of Anthony N. Brady, was a bequest and not income and not taxable, and duly protested against any tax being levied thereon. That the original amended return filed with defendant is hereby made a part hereof as though the same was set forth in full herein.

8 Fifth. That under the will of Anthony N. Brady, admitted to probate by the surrogate of Albany County on August 12th, 1913, plaintiff received a specific bequest based on a certain fixed proportion of said estate and payable during a certain fixed period. That a copy of the portion of said will of Anthony N. Brady which contains the aforesaid bequest to plaintiff is hereto annexed, marked "Schedule B," and made a part hereof.

Sixth. That the amount received or receivable by plaintiff from the estate of Anthony N. Brady during the period ending December

31st, 1913, was a bequest and not income and not taxable as such within the provisions of the act of Congress, approved October 3rd, 1913.

Seventh. That deducting from plaintiff's income said amount received or receivable by plaintiff from the estate of Anthony N. Brady, as set forth in plaintiff's said amended income tax return for the period ending December 31st, 1913, referred to in paragraph or subdivision numbered "Third" of this second cause of action of the complaint, the balance of plaintiff's income was not taxable within the provisions of the said act of Congress, approved October 3rd, 1913.

Eighth. That on June 8th, 1916, plaintiff paid to defendant said tax amounting to two thousand ninety-seven dollars and eighty-two cents ($2,097.82) under protest and by compulsion and under duress, for the reason that in case of default in the payment thereof defendant threatened to enforce collection and impose a further penalty and that plaintiff had no means of immediate relief other than such payment, and plaintiff specifically notified defendant that
9 he made such payment by compulsion and under duress and without waiver of his right to recover same, and further specifically objected to the assessment of said tax against him and the imposition of said penalty and protested against the payment of same for the reason that said tax was erroneously, illegally, and unlawfully assessed against him, in that said tax was based upon sums received by plaintiff during said period ending December 31st, 1913, from the estate of Anthony N. Brady, which was a bequest and not income and therefore not taxable, that said tax was not a proper tax upon his income and was contrary to the letter and spirit of said act of Congress, approved October 3rd, 1913, and that the additional and super tax was objectionable on the ground that the same was unconstitutional and void. That a copy of the written protest filed with the defendant at the time of making said payment is hereby referred to and made a part hereof as though the same was set forth in full herein.

Ninth. That at the time said additional tax was paid plaintiff appealed to the United States Commissioner of Internal Revenue for the remission of said penalty imposed upon him, upon the ground that the amount received by him from the estate of Anthony N. Brady was a bequest and, therefore, not taxable, and for that reason no return of his income for the period ending December 31st, 1913, was made at the time the said return was due, namely, on or before March 1st, 1914. That plaintiff thereafter filed a return and that by ruling of the United States Internal Revenue on March 16th, 1916, he was advised that he must file an
10 amended return, including not only the amounts received by him from the estate of Anthony N. Brady, but the amounts receivable, and he filed such amended return without prejudice to the demands theretofore or thereafter made by plaintiff to recover

the entire amount of said tax, by reason of the fact that the amount received by him from the estate of Anthony N. Brady is a bequest and not income.

Tenth. That thereafter said claim for the remission of said penalty was disallowed by said United States Commissioner of Internal Revenue, and after notice and demand on August 16th, 1916, plaintiff paid to defendant, under protest, said penalty of one thousand forty-eight dollars and ninety-one cents ($1,048.91), together with twenty-six dollars and twenty-two cents ($26.22), interest thereon. That a copy of the written protest filed with defendant at the time of making said payment is hereby referred to and made a part hereof as though the same was set forth in full herein.

Eleventh. That on or about November 10th, 1916, and within two years after the collection by defendant from plaintiff of said additional tax, penalty, and interest, amounting to three thousand one hundred seventy-two dollars and ninety-five cents ($3,172.95), as aforesaid, plaintiff appealed to the United States Commissioner of Internal Revenue to refund said additional tax, penalty, and interest, upon the ground that said tax was erroneously, wrongfully, and unlawfully assessed against him, in that said tax was based upon sums received or receivable by him during said year 1913, from the estate of Anthony N. Brady, which was a bequest and not income, and therefore not taxable, and that said tax was
11 not a tax upon his net income, but was contrary to *to* and against the letter and spirit of the act of Congress approved October 3rd, 1913, and that all additional and super tax was unconstitutional and void. That said claim for refund, duly filed by plaintiff, is hereby referred to and made a part hereof as though the same was set forth in full herein.

Twelfth. Upon information and belief, that thereafter and on or about April 14th, 1917, said claim for refund was rejected by the United States Commissioner of Internal Revenue and notice of said rejection was given to plaintiff by defendant.

Thirteenth. That by reason of the foregoing there is lawfully due to plaintiff from defendant the sum of three thousand one hundred seventy-two dollars and ninety-five cents, ($3,172.95), with interest on two thousand ninety-seven dollars and eighty-two cents ($2,097.82) from June 8th, 1916, and on one thousand seventy-five dollars and thirteen cents ($1,075.13) from August 16th, 1916.

FOR A THIRD CAUSE OF ACTION

First. Repeats, realleges, and makes a part hereof all the allegations contained in paragraphs or subdivisions numbered "First" and "Second" of the first cause of action of the complaint herein.

Second. That on or about June 1st, 1915, plaintiff received from the defendant a notice of assessment of special excise and income tax, which was a tax, as plaintiff is informed and believes, claimed

to be assessed upon his individual income for the year ending
12 December 31st, 1914. That said notice provided that the tax was due and payable to the defendant on or before June 30th, 1915, and that to avoid penalty and interest, taxes must be paid to defendant in such a manner as would enable him to place same with his depository not later than the close of business of the date before mentioned. That said tax amounted to four thousand one hundred fifty-one dollars and sixty-one cents, ($4,151.61). That a copy of said notice is hereto annexed, marked "Schedule D," and made a part hereof.

Third. Upon information and belief, that said income tax was based upon the supplemental return for the year ending December 31st, 1914, made and filed by plaintiff with the defendant on or about April 10th, 1915.

Fourth. That in filing his said supplemental return for the period ending December 31st, 1914, plaintiff made a specific claim that all sums received by him, which were designated in said supplemental return, from the estate of Anthony N. Brady, was a bequest and not income and not taxable, and duly protested against any tax being levied thereon. That the original supplemental return filed with defendant is hereby made a part hereof as though the same was set forth in full herein.

Fifth. That under the will of Anthony N. Brady, deceased, admitted to probate by the surrogate of Albany County on August 12th, 1913, plaintiff received a specific bequest based on a certain fixed proportion of said estate and payable during a certain fixed period. That a copy of the portion of said will of Anthony N. Brady which contains the aforesaid bequest to plaintiff is hereto annexed, marked "Schedule B," and made a part hereof.

13 Sixth. That the amount received by plaintiff from the estate of Anthony N. Brady during the year ending December 31st, 1914, was a bequest and not income and not taxable as such within the provisions of the act of Congress, approved October 3rd, 1913.

Seventh. That deducting from plaintiff's income said amount received by plaintiff from the estate of Anthony N. Brady, as set forth in plaintiff's said supplemental income tax return for the year ending December 31st, 1914, referred to in paragraph or subdivision numbered "Third" of this third cause of action of the complaint, the balance of plaintiff's income was not taxable within the provisions of the said act of Congress, approved October 3rd, 1913.

Eighth. That on June 30th, 1915, plaintiff paid to defendant said tax, amounting to four thousand one hundred fifty-one dollars and sixteen cents ($4,151.16), under protest and by compulsion and under duress, for the reason that in case of default in the payment thereof defendant threatened to enforce collection and impose a penalty, and that plaintiff had no means of immediate relief other than such payment, and plaintiff specifically notified defendant that

he made such payment by compulsion and under duress and without waiver of his rights to recover same, and further specifically objected to the assessment of said tax against him and protested against the payment of same for the reason that said tax was erroneously, illegally, and unlawfully assessed against him, in that said tax was based upon sums received by plaintiff during
14 said year ending December 31st, 1914, from the estate of Anthony N. Brady, which was a bequest and not income, and therefore not taxable; that said tax was not a proper tax upon his income and was contrary to the letter and spirit of said act of Congress approved October 3rd, 1913. That a copy of the written protest filed with the defendant at the time of making said payment is hereby referred to and made a part hereof as though the same was set forth in full herein.

Ninth. That on or about November 10th, 1916, and within two years after the collection by defendant from plaintiff of said tax, amounting to four thousand one hundred fifty-one dollars and sixteen cents ($4,151.16), as aforesaid, plaintiff appealed to the United States Commissioner of Internal Revenue to refund said tax upon the ground that said tax was erroneously, wrongfully, and unlawfully asses'ed against him, in that said tax was based upon sums received by him during said year 1914, from the estate of Anthony N. Brady, which was a bequest and not income, and therefore not taxable, and that said tax was not a tax upon his net income and was contrary to and against the letter and spirit of the act of October 3rd, 1913, that an additional and super tax was unconstitutional and void. That said claim for refund, duly filed, is hereby referred to and made a part hereof as though the same was set forth in full herein.

Tenth. Upon information and belief, that thereafter and on or about April 14th, 1917, said claim for refund was rejected by the United States Commissioner of Internal Revenue and notice of said rejection was given to plaintiff by defendant.

15 Eleventh. That by reason of the foregoing there is lawfully due to plaintiff from the defendant the sum of four thousand one hundred fifty-one dollars and sixteen cents ($4,151.16).

FOR A FOURTH CAUSE OF ACTION

First. Repeats, realleges, and makes a part hereof all the allegations contained in paragraphs or subdivisions numbered "First" and "Second" of the first cause of action of the complaint herein.

Second. That on or about May 29th, 1916, plaintiff received from the defendant a notice of and a demand for an additional tax claimed to be assessed upon his individual income for the period ending December 31st, 1914, demanding payment of said additional tax on or before June 8th, 1916. That said notice further provided that if said additional tax was not in the hands of defendant

for deposit before the close of business on said date, it would be his duty, under the law, to collect the same, together with five per centum additional and interest at one per centum per month until paid. That said tax amounted to nine thousand three hundred eleven dollars and seventeen cents ($9,311.17). That a copy of said notice is hereby annexed, marked "Schedule E," and made a part hereof.

Third. Upon information and belief that said additional income tax was based upon the amended return for the year ending December 31st, 1914, made and filed by plaintiff with the defendant on or about April 13th, 1916.

Fourth. That in filing his said amended return for the
16 year ending December 31st, 1914, plaintiff made a specific claim that all sums received by him, which were designated in said amended return, from the estate of Anthony N. Brady, was a bequest and not income and not taxable, and duly protested against any tax being levied thereon. That the original amended return filed with defendant is hereby made a part hereof as though the same was set forth in full herein.

Fifth. That under the will of Anthony N. Brady, admitted to probate by the surrogate of Albany County on August 12th, 1913, plaintiff received a specific bequest based on a certain fixed proportion of said estate and payable during a certain fixed period. That a copy of the portion of said will of Anthony N. Brady which contains the aforesaid bequest to plaintiff is hereto annexed, marked "Schedule B," and made a part hereof.

Sixth. That the amount received or receivable by plaintiff from the estate of Anthony N. Brady during the year ending December 31st, 1914, was a bequest and not income and not taxable as such within the provisions of the act of Congress, approved October 3rd, 1913.

Seventh. That deducting from plaintiff's income said amount received or receivable by plaintiff from the estate of Anthony N. Brady, as set forth in plaintiff's said amended income tax return, for the period ending December 31st, 1914, referred to in paragraph or subdivision numbered "Third" of this fourth cause of action of the complaint, the balance of plaintiff's income was not taxable within the provisions of the said act of Congress, approved October 3rd, 1913.

17 Eighth. That on June 8th, 1916, plaintiff paid to defendant said tax amounting to nine thousand three hundred and eleven dollars and seventeen cents ($9,311.17), under protest and by compulsion and under duress, for the reason that in case of default in the payment thereof defendant threatened to enforce collection and impose a penalty and that plaintiff had no means of immediate relief other than such payment, and plaintiff specifically notified defendant that he made such payment by compulsion and under duress and without waiver of his rights to recover same, and further specifically objected to the assessment of said tax against him and pro-

tested against the payment of same for the reason that said tax was erroneously, illegally, and unlawfully assessed against him, in that said tax was based upon sums received by plaintiff during said year ending December 31st, 1914, from the estate of Anthony N. Brady, which was a bequest and not income and therefore not taxable, that said tax was not a proper tax upon his income and was contrary to the letter and spirit of said act of Congress, approved October 3rd, 1913, and that the additional and super tax was objectionable on the ground that the same was unconstitutional and void. That a copy of the written protest filed with the defendant at the time of making said payment is hereby referred to and made a part hereof as though the same was set forth in full herein.

Ninth. That on or about November 10th, 1916, and within two years after the collection by defendant from plaintiff of said additional tax amounting to nine thousand three hundred and
18 eleven dollars and seventeen cents ($9,311.17), as aforesaid, plaintiff appealed to the United States Commissioner of Internal Revenue to refund said additional tax, upon the ground that said tax was erroneously, wrongfully, and unlawfully assessed against him, in that said tax was based upon sums received or receivable by him during said year 1914, from the estate of Anthony N. Brady, which was a bequest and not income, and, therefore, not taxable, and that said tax was not a tax upon his net income, but was contrary to and against the letter and spirit of the act of Congress, approved October 3rd, 1913, and that all additional and super tax was unconstitutional and void. That said claim for refund, duly filed by plaintiff, is hereby referred to and made a part hereof as though the same was set forth in full herein.

Tenth. Upon information and belief, that thereafter and on or about April 14th, 1917, said claim for refund was rejected by the United States Commissioner of Internal Revenue and notice of said rejection was given to plaintiff by defendant.

Eleventh. That by reason of the foregoing there is lawfully due to plaintiff from defendant the sum of nine thousand three hundred and eleven dollars and seventeen cents ($9,311.17).

FOR A FIFTH CAUSE OF ACTION

First. Repeats, realleges, and makes a part hereof all the allegations contained in paragraphs or subdivisions numbered "First" and "Second" of the first cause of action of the complaint herein.

Second. That on or about May 29th, 1916, plaintiff received
19 from defendant notice of assessment of special excise and income tax, which was a tax, as plaintiff is informed and believes, claimed to be assessed upon his individual income for the year ending December 31st, 1915. That said notice provided that the tax was due and payable to the defendant on or before June 30th, 1916, and that to avoid penalty and interest, taxes must be paid to defendant in such a manner as would enable him to place same with

his depository not later than the close of business of the date before mentioned. That a copy of said notice is hereto annexed marked "Schedule F" and made a part hereof. That said tax amounted to $4,672.01.

Third. Upon information and belief, that said income tax was based upon the return for the year ending December 31, 1915, made and filed by plaintiff with the defendant on or about March 30, 1916.

Fourth. That in filing his said return for the year ending December 31, 1915, plaintiff made a specific claim that all sums received by him, which were designated in said amended return, from the estate of Anthony N. Brady, was a bequest and not income and not taxable, and duly protested against any tax being levied thereon. That the original return filed with defendant is hereby made a part hereof as though the same was set forth in full herein.

Fifth. That under the will of Anthony N. Brady, admitted to probate by the surrogate of Albany County on August 12, 1913, plaintiff received a specific bequest based on a certain fixed proportion of said estate and payable during a certain fixed period. That
20 a copy of the portion of said will of Anthony N. Brady which contains the aforesaid bequest to plaintiff is hereto annexed, marked "Schedule B," and made a part hereof.

Sixth. That the amount received or receivable by plaintiff from the estate of Anthony N. Brady during the year ending December 31, 1915, was a bequest and not income and not taxable as such within the provisions of the act of Congress, approved October 3, 1913.

Seventh. That deducting from plaintiff's income said amount received or receivable by plaintiff from the estate of Anthony N. Brady, as set forth in plaintiff's said income tax return, for the period ending December 31, 1915, referred to in paragraph or subdivision numbered "Third" of this fifth cause of action of the complaint, the balance of plaintiff's income was not taxable within the provisions of the said act of Congress, approved October 3, 1913.

Eighth. That on June 30, 1916, plaintiff paid to defendant said tax amounting to four thousand six hundred seventy-two dollars and one cent ($4,672.01), under protest and by compulsion and under duress, for the reason that in case of default in the payment thereof defendant threatened to enforce collection and impose a penalty and that plaintiff had no means of immediate relief other than such payment, and plaintiff specifically notified defendant that he made such payment by compulsion and under duress and without waiver of his rights to recover same, and further specifically objected to the assessment of said tax against him and protested against the payment of same for the reason that said tax was erroneously,
21 illegally, and unlawfully assessed against him, in that said tax was based upon sums received by plaintiff during said year ending December 31, 1915, from the estate of Anthony N. Brady, which was a bequest and not income and therefore not taxable, that

said tax was not a proper tax upon his income and was contrary to the letter and spirit of said act of Congress, approved October 3, 1913, and that the additional and super tax was objectionable on the ground that the same was unconstitutional and void. That a copy of the written protest filed with the defendant at the time of making said payment is hereby referred to and made a part hereof as though the same was set forth in full herein.

Ninth. That on or about November 10th, 1916, and within two years after the collection by defendant from plaintiff of said tax amounting to four thousand six hundred seventy-two dollars and one cent ($4,672.01), as aforesaid, plaintiff appeared to the United States Commissioner of Inter'al Revenue to refund said tax, upon the ground that said tax was erroneously, wrongfully, and unlawfully assessed against him, in that said tax was based upon sums received or receivable by him during said year 1915, from the estate of Anthony N. Brady, which was a bequest and not income and, therefore, not taxable, and that said tax was not a tax upon his net income, but was contrary to and against the letter and spirit of the act of Congress, approved October 3rd, 1913, and that all additional and super tax was unconstitutional and void. That said claim for refund, duly filed by plaintiff, is hereby referred to and made a part hereof as though the same was set forth in full herein.

22 Tenth. Upon information and belief, that thereafter and on or about April 14th, 1917, said claim for refund was rejected by the United States Commissioner of Internal Revenue and notice of said rejection was given to plaintiff by defendant.

Eleventh. That by reason of the foregoing there is lawfully due to plaintiff from defendant the sum of four thousand six hundred seventy-two dollars and one cent ($4,672.01), with interest thereon from June 30th, 1916.

Wherefore plaintiff demands judgment against the defendant in the sum of twenty-one thousand six hundred and two dollars and sixteen cents ($21,602.16), with interest on one hundred ninety-six dollars and fifty-eight cents ($196.58) from June 11th, 1915, on ninety-eight dollars and twenty-nine cents ($98.29) from June 29th, 1915, on four thousand one hundred fifty-one dollars and sixteen cents ($4,151.16) from June 30th, 1915, on eleven thousand four hundred eight dollars and ninety-nine cents ($11,408.99) from June 8th, 1916, on four thousand six hundred seventy-two dollars and one cent ($4,672.01) from June 30th, 1916, and on one thousand seventy-five dollars and thirteen cents ($1,075.13) from August 16th, 1916, besides costs.

NEILE F. TOWNER,
Attorney for Plaintiff.

Office and post-office address, No. 13 North Pearl Street, Albany, New York.

23 (Jurat showing the foregoing was duly sworn to by E. Palmer Gavit. Omitted in printing.)

Exhibit to complaint

SCHEDULE "A"

[Front]

Tax $196.58. 50% penalty $98.29. Form 17. United States Internal Revenue. Notice of and demand for tax assessed. List for month of Apr., 1915.

24 52–8 Division.

UNITED STATES INTERNAL REVENUE,
OFFICE OF THE COLLECTOR,
14TH DISTRICT OF NEW YORK,
At Albany, June 1, 1915.

To E. PALMER GAVIT,
Thurlow Terrace, Albany.

You are hereby notified that a tax, under the internal revenue laws of the United States, amounting to $294.87, the same being a tax upon individual income tax for the period ending Dec. 31, 1913, has been assessed against you by the Commissioner of Internal Revenue and transmitted by him to me for collection.

Demand is here made for this tax, which is due and payable, to the person designated below on or before June 11, 1915, such payment to be made in the manner set forth on the reverse side of this notice and demand. If this tax is not in my hands for deposit before the close of business of the day above specified it will be my duty, under the law, to collect the same, together with 5 per centum additional, and interest at 1 per centum per month until paid.

Payment may be made to at Albany, or to Roscoe Irwin, collector.

Uncertified checks not accepted. Carefully note instructions on the back of this notice.

25

[Back]

To avoid penalty and interest, taxes must be paid to the collector or person designated by him in such a manner as will enable him to place the same with his depositary and receive a certificate of deposit therefor not later than the close of business of the date mentioned in the body of this notice.

Payment may be made in currency, post office money order, or certified check on a National or State bank or trust company, providing such checks can be collected without cost to the Government. It should be borne in mind by taxpayers that the date when such checks may be cashed and the money deposited is the date of payment, and allowance should be made accordingly.

Collectors cannot receive in payment of taxes uncertified checks, personal checks, drafts, or vouchers, and all indorsements by collec-

tors on certified checks are made without recourse. Money orders and certified checks must be made payable to the collector of internal revenue.

SCHEDULE "B"

Seventh. All the rest, residue, and remainder of the real and personal property of which I may die seized and possessed, I direct my executors and trustees to divide into six equal parts and I give, devise, and bequeath the same as follows:

* * * * * * *

One part, to my executors and trustees, in trust nevertheless for the following uses and purposes, to wit: To collect and receive the rents, income, and profits thereof and after paying all
26 necessary expenses to dispose of the net rents, income, and profits thereof as follows: I direct my executors and trustees to apply so much of said net rents, income, and profits as they in the exercise of their absolute discretion, shall deem proper for the maintenance, education, and support during her minority, of my granddaughter, Marcia Ann Gavit, and I direct my executors and trustees in fixing the amount of said allowance to consider the station in life of my said granddaughter, my desire being that she shall be amply and liberally provided for in every way. All income to be applied to the maintenance, education, and support of my said granddaughter may be either so applied by my executors and trustees directly, or may in their discretion be paid by them to the guardian of the person of said minor, and the receipt of such guardian shall be full and complete discharge to them for all moneys so paid by them to such guardian. The balance of said net rents, income, and profits shall be divided into two equal parts: One of the said parts shall be paid to my son-in-law, Erastus Palmer Gavit, in equal quarter yearly payments during his life. The other moiety shall be accumulated for the benefit of my said granddaughter. Upon the death of my said granddaughter before she attains her majority, whether her father be then living, or not, I give, devise, and bequeath the capital of said trust estate to her issue in equal shares, per stirpes, and if she leaves no issue, whether her father be then living or not, I give, devise, and bequeath said capital to my issue, share and share alike, per stirpes. When my granddaughter attains the age of twenty-one years, whether her father be then living,
27 or not, and whether she then has living issue, or not, I direct that said trust shall cease, and I give, devise, and bequeath the capital of said trust estate to my said granddaughter, her heirs and assigns forever.

SCHEDULE "C"

[Front]

Tax, $2,097.82. 50% penalty, $1,048.91. Amended return. Add. tax only. Notice of and demand for tax assessed.

Form 17. United States Internal Revenue. F. C. Jan 13–16. Uncertified checks not accepted. List for month of Apr., 1916.

54–30 division.

UNITED STATES INTERNAL REVENUE.
OFFICE OF THE COLLECTOR.
14TH DISTRICT OF NEW YORK.
At Albany, May 29th, 1916.

To E. PALMER GAVIT,
Thurlow Terrace, Albany.

You are hereby notified that a tax, under the internal revenue laws of the United States, amounting to $3,146.73, the same being a tax upon individual income tax for the period ending December 31st, 1913, has been assessed against you by the Commissioner of Internal Revenue and transmitted by him to me for collection.

Demand is here made for this tax, which is due and payable
28 to the person designated below on or before June 8th, 1916, such payment to be made in the manner set forth on the reverse side of this notice and demand. If this tax is not in my hands for deposit before the close of business of the day above specified it will become my duty, under the law, to collect the same, together with 5 per centum additional, and interest at 1 per centum per month until paid.

Payment to be made to at Albany, or to Roscoe Irwin, collector.

[Back]

To avoid penalty and interest, taxes must be paid to the collector or person designated by him in such a manner as will enable him to place the same with his depositary and receive a certificate of deposit therefor not later than the close of business of the date mentioned in the body of this notice.

Payment may be made in currency, post-office money order, or certified check on a National or State bank or trust company, providing such checks can be collected without cost to the Government. It should be borne in mind by taxpayers that the date when such checks may be cashed and the money deposited is the date of payment, and allowance should be made accordingly.

Collectors can not receive in payment of taxes uncertified checks, personal checks, drafts, or vouchers, and all indorsements by col-

lectors on certified checks are made without recourse. Money orders and certified checks must be made payable to the collector of internal revenue.

29 "SCHEDULE "D"

[Front]

Form 647. United States Internal Revenue. Notice of assessment of special excise and income tax. List for month of April, 1915.

UNITED STATES INTERNAL REVENUE.
OFFICE OF THE COLLECTOR,
14TH DISTRICT OF NEW YORK,
At Albany, June 1, 1915.

To E. PALMER GAVIT,
Thurlow Terrace, Albany:

Individual income tax.

You are hereby notified that {special excise tax / income tax} under the provisions of section {38 of the act of August 5, 1909, / 2 of the act of October 3, 1913,} amounting to $4,151.16, has been assessed against you by the Commissioner of Internal Revenue and transmitted by him to me for collection. This tax is due and payable on or before June 30, 1915, to the person designated below in the manner set forth on the reverse side of this notice.

Payment may be made to at Albany, or to Roscoe Irwin, collector.

Uncertified checks not accepted. Bring this notice with you.

30 [Back]

To avoid penalty and interest, taxes must be paid to the collector or person designated by him in such a manner as will enable him to place the same with his depositary and receive a certificate of deposit therefor not later than the close of business of the date mentioned in the body of this notice.

Payment may be made in currency, post-office money order, or certified check on a National or State bank or trust company, providing such checks can be collected without cost to the Government. It should be borne in mind by taxpayers that the date when such checks may be cashed and the money deposited is the date of payment, and allowance should be made accordingly.

Collectors can not receive in payment of taxes uncertified checks, personal checks, drafts, or vouchers, and all indorsements by collectors on certified checks are made without recourse. Money orders and certified checks must be made payable to the collector of internal revenue.

SCHEDULE "E"

[Front]

Original-Amended. Add. tax only. Notice of and demand for tax assessed. Form 17. United States Internal Revenue, F. C. Jan. 13–16.

Uncertified checks not accepted. List for month of Apr., 1916. 52–13 Division.

31

UNITED STATES INTERNAL REVENUE,
OFFICE OF THE COLLECTOR,
14TH DISTRICT OF NEW YORK,
At Albany, May 29th, 1916.

To E. PALMER GAVIT,
Thurlow Terrace, Albany.

You are hereby notified that a tax, under the internal revenue laws of the United States, amounting to $9,311.17, the same being a tax upon individual income tax for the period ending December 31st, 1914, has been assessed against you by the Commissioner of Internal Revenue and transmitted by him to me for collection.

Demand is here made for this tax, which is due and payable to the person designated below on or before June 8th, 1916, such payment to be made in the manner set forth on the reverse side of this notice and demand. If this tax is not in my hands for deposit before the close of business of the day above specified it will become my duty, under the law, to collect the same, together with 5 per centum additional, and interest at 1 per centum per month until paid.

Payment may be made to at Albany, or to Roscoe Irwin, collector.

[Back]

To avoid penalty and interest, taxes must be paid to the collector or person designated by him in such a manner as will enable him to place the same with his depositary and receive a certificate
32 of deposit therefor not later than the close of business of the date mentioned in the body of this notice.

Payment may be made in currency, post-office money order, or certified check on a National or State bank or trust company, providing such checks can be collected without cost to the Government. It should be borne in mind by taxpayers that the date when such checks may be cashed and the money deposited is the date of payment, and allowance should be made accordingly.

Collectors can not receive in payment of taxes uncertified checks, personal checks, drafts, or vouchers, and all indorsements by collectors on certified checks are made without recourse. Money orders and certified checks must be made payable to the collector of internal revenue.

SCHEDULE "F"

[Front]

Form 647. Add. tax only. United States Internal Revenue. Notice of assessment of special excise and income tax. List for month of April, 1916.

UNITED STATES INTERNAL REVENUE,
OFFICE OF THE COLLECTOR,
14TH DISTRICT OF NEW YORK.
At Albany, May 29, 1916.

33 To E. PALMER GAVIT,
Thurlow Terrace, Albany.
Individual income tax 16–8.

You are hereby notified that a {special excise tax / income tax} under the provisions section {2 of the act of October 3, 1913, / 38 of the act of August 5, 1909,} amounting to $4,672.01 has been assessed against you by the Commissioner of Internal Revenue and transmitted by him to me for collection. This tax is due and payable on or before the June 30th, 1916, to the person designated below in the manner set forth on the reverse side of this notice.

Uncertified checks not accepted. Payment may be made to at Albany, or to Roscoe Irwin, collector. Bring this notice with you.

[Back]

To avoid penalty and interest, taxes must be paid to the collector or person designated by him in such a manner as will enable him to place the same with his depositary and receive a certificate of deposit therefor not later than the close of business of the date mentioned in the body of this notice.

Payment may be made in currency, post-office money order, or certified check on a National or State bank or trust company, providing such checks can be collected without cost to the Gov-
34 ernment. It should be borne in mind by the taxpayers that the date when such checks may be cashed and the money deposited is the date of payment, and allowance should be made accordingly.

Collectors can not receive in payment of taxes uncertified checks, personal checks, drafts or vouchers, and all indorsements by collectors on certified checks are made without recourse. Money orders and certified checks must be made payable to the collector of internal revenue.

In United States District Court

[Title omitted.]

Demurer

The defendant above named hereby demurs to the plaintiff's complaint on the ground that the said complaint failed to state facts sufficient to constitute a cause of action.

Wherefore the defendant demands that the demurrer herein be sustained and the complaint dismissed with costs.

D. B. LUCEY,
U. S. Attorney and Attorney for Defendant.

74 Ford St., Ogdensburg, St. Lawrence County, N. Y.

35 In United States District Court

[Title omitted.]

Order overruling demurrer

This cause having been regularly brought on for hearing before Hon. Frank Cooper, judge of this court, upon the issue of law joined by the demurrer interposed by the defendant to the complaint of the plaintiff and after hearing Dennis B. Lucey, Esq., United States attorney, for the defendant, and Neile F. Towner, Esq., for the plaintiff, and due deliberation having been had thereon,

Now, on motion of Neile F. Towner, Esq., attorney for the plaintiff, it is

Ordered that the demurrer interposed by the defendant herein be and the same hereby is overruled, and it is further

Ordered that in case the defendant does not interpose an answer within twenty days after the service of a copy of this order upon his attorney that plaintiff is entitled to enter judgment for the relief demanded in the complaint with costs.

Dated, August 9th, 1922.

FRANK COOPER,
U. S. D. J.

36 In United States District Court

[Title omitted.]

Judgment

This cause having been regularly brought on for hearing before Hon. Frank Cooper, judge of this court, upon the issue of law joined by the demurrer interpos'd by the defendant to the complaint of the plaintiff and after hearing Dennis B. Lucey, Esq., United States at-

torney, for the defendant, and Neile F. Towner, Esq., for the plaintiff, and an order having been made that the demurrer interposed by the defendant be overruled and that in case defendant did not interpose an answer within twenty (20) days after the service of a copy of said order upon his attorney, the plaintiff would be entitled to judgment for the relief demanded in the complaint and this defendant not having interposed an answer within twenty (20) days after service of a copy of this order upon his attorney,

Now, on motion of Neile F. Towner, Esq., attorney for the plaintiff, it is

Ordered and adjudged that plaintiff have judgment against
37 the defendant in the sum of thirty thousand ninety dollars and thirty-five cents ($30,090.35) damages and fourteen dollars and thirty-five cents ($14.35) costs and disbursements as taxed by the clerk of this court, amounting in all to thirty thousand one hundred four dollars and seventy cents ($30,104.70), and have execution therefor.

Signed, docketed, and entered, October 25, 1922, 3 p. m.

C. W. Higgison,
Clerk United States District Court.

In United States District Court

[Title omitted.]

Affidavit for judgment

State of New York,
City and County of Albany, ss:

Neile F. Towner, being duly sworn, deposes and says that he is the attorney for the plaintiff herein. That on August 16, 1922, he served a certified copy of the order of this court overruling the demurrer herein dated August 9, 1922, on Hiram C. Todd, Esq., United
States district attorney for the Northern District of New
38 York, attorney for the defendant herein, by delivering a certified copy of said order to Earl Gallup, Esq., assistant United States district attorney, at the office of the said United States district attorney in the post office building, who was in charge of said office during the absence of said United States district attorney.

Deponent further says that more than twenty (20) days has elapsed since the service of said order as aforesaid, and the defendant has not interposed any answer in this action and is in default.

That deponent further says that he has calculated the amount due as demanded in the complaint as follows:

Amount of principal	$21,602.16
With interest as follows to October 24, 1922:	
On $196.58 from June 11, 1915	86.92
On $98.29 from June 29, 1915	43.16
On $4,151.16 from June 30, 1915	1,822.36
On $11,408.99 from June 8, 1916	4,365.84
On $4,672.01 from June 30, 1916	1,770.67
On $1,075.13 from August 16, 1916	399.24
Total	30,090.35
Costs	14.35
Final total	30,104.70

NEILE F. TOWNER.

Sworn to before me this 23rd day of October, 1922.

[SEAL.]

GEO. C. TOBIN,
Notary Public, Albany Co.

39

Opinion

In United States District Court

[Title omitted.]

Appearances: Neile F. Towner, Albany, N. Y., for the plaintiff; Dennis B. Lucey, U. S. attorney, for the defendant.

COOPER, *J.:*

By the will of Anthony N. Brady, deceased, he divided his estate into six equal parts and devised one-sixth of his estate in trust to his executors who were thereby made trustees. The trustees were directed to apply so much of the income and profits from such one-sixth as in their discretion they thought necessary for the support and maintenance of decedent's granddaughter, Marcia Ann Gavit, daughter of the plaintiff herein, and to divide the remainder of the income of such one-sixth not necessary for the support of the granddaughter into two parts, one of said parts to be paid
40 to the plaintiff during his life, but not longer than the infancy of the daughter, Marcia Ann Gavit, and not longer than her natural life should she die before attainting the age of twenty-one years.

During the tax years of 1913–1914–1915, the plaintiff received certain sums of money under the provisions of the Brady will upon which he has been required to pay as normal tax, additional tax and penalties, the sum of $21,602.16. He paid this under protest and appealed to the Commissioner of Internal Revenue, who decided against him, and the plaintiff has now brought this action to recover such amount of taxes with interest.

The question before the court arising upon a demurrer to the complaint is whether or not the moneys so received by the plaintiff under the aforesaid provisions of the Brady will are taxable as income within the meaning of the income tax act of October 3, 1913. (338 Stat. 114.)

The provisions of this act, so far as applicable, are as follows:

"Section 11.

"A. Subdivision 1. That there shall be levied, assessed, collected, and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year *to every citizen* of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, * * *.

Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax)
41 there shall be levied, assessed, and collected upon the net income of every individual an additional income tax (herein referred to as the additional tax) of 1 per centum per annum upon this amount by which the total net income exceeds $20,000 and does not exceed $50,000." (Here follows percentages of additional tax.)

"D. *, * *; guardians, trustees, * * *, and all persons, * * * acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals; * * *.

"E. * * *. All persons, * * * in whatever capacity acting, including * * * trustees acting in any trust capacity, * * * having the control, receipt, custody, disposal, or payment of interest, rent, salaries, wages, * * * or other fixed or determinable annual gains, profits, and income of another person, exceeding $3,000 for any taxable year, other than dividends on capital stock, or from the net earnings of corporations and joint-stock companies or associations subject to like tax, who are required to make and render a return in behalf of another, as provided herein, to the collector of his, her or its district, are hereby authorized and required to deduct and withhold from such annual gains, profits and income such sum as will be sufficient to pay the normal tax imposed thereon by this section, and shall pay to the officer of the United States Gov-
42 ernment authorized to receive the same; and they are each hereby made personally liable for such tax. * * *

A. Subdivision 2. * * * All the provisions of this section relating to individuals who are chargeable with the normal income tax, so far as they are applicable and are not inconsistent with this subdivision of paragraph A, shall apply to the levy, assessment and collection of the additional tax imposed under this section."

"B. That * * * the net income of a taxable person shall include * * * gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent."

The plaintiff contends that the moneys thus received by him are not income under the provisions of the act of 1913, especially in view of the provisions of subdivision B of such act, and that even if they come under the act of 1913 they are not income within the meaning of the 16th amendment to the Constitution of the United States and that the statute is unconstitutional.

The courts have held that income, within the meaning of the Constitution and the income tax act passed pursuant to the 16th amendment, must be taken in the common understanding of the term. (Eisner v. Macomber, 252 U. S. 189.)

Income as laid down by the United States Supreme Court, within the purview of the Constitution, is defined as:

"* * * the gain derived from capital, from labor, or
43 from both combined, provided it be understood to include profits gained through a sale or conversion of capital assets."

Eisner v. Macomber, 252 U. S. 189, citing, Stratton Ind. v. Howbert, 231 U. S. 399, 415. Doyle v. Mitchell Bros. Co., 247 U. S. 179, 185.

In the same case (Eisner v. Macomber) the relation of capital to income is expressed as follows:

"The fundamental relation of 'capital' to 'income' has been discussed by the economists the former being likened to the tree on or the land, the latter to the fruit or the crop; the former being depicted as a reservoir supplied from springs; the latter as the outlet stream, to be measured by its flow, during a period of time."

Since the moneys received by plaintiff were not income from labor, nor from labor and capital combined, nor from the sale or conversion of capital assets, we have only to do with income received from capital. Income as now considered is, after the severance, separate and apart from the capital; it is as separate and apart from the capital as the fruit from the tree, the crops from the land after severance, or the waters in the outlet stream after passing out of the reservoir. It is something which has grown out of or issued from capital, leaving the capital, unimpaired and intact.

Having these considerations in mind, it can not be said that these moneys received by the plaintiff arose from any capital of his. So far as appears from the pleadings in this case, he had no
44 land, trees, or reservoir to produce crops, fruit, or outlet water—no capital of any kind whatever.

If the income-tax law of 1913, therefore, is intended only to tax the income which is the fruit of the taxpayer's labor, or the income from the taxpayer's capital, in which case he has a present ownership (or at least a vested future interest, meantime receiving the income or the gain from the sale or conversion of the taxpayer's

capital assets) then the money received by the plaintiff is not income as to him because he has not and never will have the slightest ownership, present or future, vested or contingent, in the capital producing this income.

If this is income, therefore, it is the income not of the capital of the plaintiff, but of the capital or a portion of the Brady estate, which capital will never be that of the plaintiff.

There is nothing in the act of 1913 which taxes income which is not the income of the citizen or the individual sought to be taxed. The levy, assessment, and payment is upon the net income of a "*citizen*," section A, subdivision I. "*Individuals*" are chargeable with the normal and the additional income tax, section A, subdivision 2. The return required by section A, subdivision 2, is a *personal* return.

An estate is not a "citizen" nor a "person." There is nothing in the act of 1915 which shows any intent to tax the income of estates as distinguished from the income of a citizen or individual resident of the country. There is in the act no definition of citizens of individuals which makes either of these terms include estates.

45 It is true that section A, subdivision 1, speaks of "income arising or accruing from all sources * * * to every citizen" and section A, subdivision 2, uses the language, "income derived from any source whatever." This must, however, be held to mean moneys which are essentially income and which are income received from the labor or capital or both, or the conversion of the capital assets, of the person sought to be taxed, and to be limited by the provisions of subdivision B.

The act of 1913 in section 1, subdivision B, purports to define the income of a taxable person liable to tax. There is no suggestion in subdivision B of any tax upon the income of estates, as distinguished from the income of individuals. This subdivision B in defining what shall be deemed to be income of a "*taxable person*" provides that the net income of a "*taxable person*" shall include "*income from*, but *not the value of property* acquired by gift, bequest, devise, or descent." This means that there shall be included within the taxable income of a person liable to tax, the income which he shall receive from property acquired by gift, bequest, devise, or descent. It should be construed as if the statute read—"The income of a taxable person shall include the income from property acquired by gift, bequest, devise, or descent, but not the value of the property itself."

The transfer of possession and the beneficial use of property acquired by a person by gift, bequest, devise, or descent is usually delayed by reason of the necessity for operating the legal

46 machinery required to execute the provisions of the law of trusts, probate, and intestacy. Oftimes the property which the person thus receives is withheld for a period of time and he does not get the corpus or capital of the property which he receives by

gift, bequest, devise, or descent, until a long time after the right thereto is created. During all this suspension of absolute ownership and possession of the property thus acquired, interest, or income, accrues. The intent of subdivision B is to tax to the person the income which accrued and is received by him from the property acquired by gift, bequest, devise, or descent and which property has been withheld from him.

There is no suggestion in subdivision B that the income of estates as such, regardless of what disposition is made of the income, shall be taxable and the tax thereon paid by any person, either in his individual right or as fiduciary.

The other provisions of the act relating to fiduciaries, are in entire harmony with this construction. Subdivision 2, paragraph D, requires the guardians, trustees, etc., of persons *who are subject to an income tax because of the amount of income received* from such property acquired by gift, bequest, devise, or descent, make a return of the net income of such persons, subject to this tax, for whom such guardians or trustees act. Subdivision 2, paragraph E, provides that where the income of any person shall exceed three thousand dollars for any taxable year, the guardian, trustee, etc., of such person shall withhold and deduct from the income paid to such person the amount of income tax on such income so paid to such person.

47 The last provisions relating to fiduciaries are machinery to safeguard the Government's obtaining the income tax on the income of persons from property which they acquire by gift, bequest, devise, or descent, which property is temporarily in possession and custody of fiduciaries.

To make these fiduciary provisions and subdivision B applicable and to bring a person thereunder, there must be both income and property received by gift, bequest, devise, or descent, and also the property or capital itself. Unless there is both, there is no income within the meaning of these provisions of the income-tax law and no income to be paid; nor is there any return to be made by the fiduciaries nor any tax to be withheld from the moneys paid to the beneficiary.

Applying this to the case at bar, we must find as to the plaintiff both the income from the property acquired by gift, bequest, devise, or descent and the property itself, within the meaning of the income-tax law of 1913. If these moneys received by the plaintiff from the trustees from this one-sixth portion of the Brady estate are income, where is the property acquired by the plaintiff from the Brady estate; in other words, his capital, either in present possession or right of future possession, from which the income arose? Clearly, there is none. He never gets the property which produces the income. So as to him there is not both the property acquired by gift, bequest, devise, or descent, and the income thereof.

The learned district attorney recognizes and concedes that "income" must be something separate, apart, and distinct from "capital," both belonging to the plaintiff. He argues in his brief
48 that the right to receive the moneys, must, of necessity, be the capital or corpus from which the moneys received by the plaintiff accrued. This contention does not carry conviction, especially in the light of the amendment to the provisions of the act, hereinafter more specifically referred to. Capital, within the intendment of the statute, must be something discernible, tangible, indivisible, and probably immeasurable. Heirs have a right to inherit. That does not make the inheritance income. So, too, an instrument providing for the future transfer of property would give the transferree the right to it, but would not thereby make the transferred property income, because it came from such right.

Moreover, there is nothing fixed, absolute, or certain about the plaintiff's right to receive any moneys in any year under the provisions of the will. If the trustees elect that the whole amount of the income of the one-sixth is necessary for the support of the testator's granddaughter as she grows older and her expenses increase, the plaintiff gets nothing. His right is extinguished. To call such a right property or capital or the equivalent thereof within the provisions of the act of 1913 would be unreasonable.

Further consideration of the character or legal status of the moneys received by plaintiff may be helpful. If the will had provided that the income of this one-sixth of the Brady estate, during the first year after his death, should be paid to the plaintiff and the income thereafter appropriated to the support of his granddaughter, so far as necessary, and the balance accumulated for her benefit, would anyone contend that the payment to the plain-
49 tiff in the one year was income within the meaning of the act of 1913? If the testator in his will had provided for such payment during the first two years after his death, would any one contend that the moneys paid to the plaintiff during the two years was income within the meaning of the act of 1913?

Would it not be clear that this was property acquired by bequest or devise by the plaintiff, the value of which is provided by subdivision B of the act of 1913 to be not taxable as income? Does the fact that the plaintiff received a portion of the income of this one-sixth for three years under the act of 1913, and may receive it longer, change its character from capital to income under this act? Under no circumstances can it last longer than fifteen years, the granddaughter being six years of age. It may cease immediately.

From the foregoing it must be determined that there is no provision of the income tax law of 1913 by which it can be held that the moneys received by plaintiff during these years 1913, 1914, 1915 are income and taxable. While the moneys received by plaintiff are income as to the estate, they are not income as to the plaintiff. As to him, they are the property acquired by bequest or devise and therefore not taxable.

It was not until 1916 that any provision was made in the income tax act for a tax upon the income of estates as well as a tax upon the income of persons. By the amendment of 1916 it was provided for the first time that the income of estates or of any kind of prop'rt/y held in trust should be taxed to the estates. Merchants' Loan and Trust Co. v. Smeitanks, 254 U. S.—(March 28, 1921.)

50 The Congress, while making this amendment, also eliminated from the income tax law that provision of subdivision B in the act of 1913 which provided that an income tax should be levied upon the income received by persons from property acquired by gift, bequest, devise, or descent, but not upon the property itself.

It may then be presumed in the light of this amendment that the legislative intent in 1916 was to cover the defect, if it may be termed such, and to change the statute to include cases similar to the one in question not before included. Its insertion at least indicates that Congress at least was doubtful whether the previous act included income of estates. United States v. Field, 254 U. S.—(February 28, 1921.) United States v. Bashaw, 50 Fed. 749, 754.

In view of this holding that the moneys received by the plaintiff are not income within the meaning of the act of 1913, it is not necessary to pass upon the constitutionality so far as respects this plaintiff.

The demurrer is overruled.

In United States District Court

Writ of error

To the honorable Judge of the District Court of the United States for the Northern District of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a cause which is in the said District Court before you, or some of you, between E. Palmer Gavit, plaintiff,

51 and Roscoe Irwin, collector of internal revenue for the fourteenth district of New York, defendant, manifest error has happened to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any, should be duly corrected and full, speedy justice done to the parties aforesaid in this behalf, do command, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with the things concerning the same to the United States Circuit Court of Appeals for the S'cond Circuit, together with this writ, so that you have the same at the post-office building in the city of New York, in said circuit, on the 29th day of March, 1923, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct the errors, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable William Howard Taft, Chief Justice of United States, this 27th day of February, A. D. 1923, and in the 148th year of the independence of the United States.

C. W. HIGGISON,
Clerk.

Allowed:
FRANK COOPER,
U. S. District Judge.

52 For United States District Court

(Title omitted.)

Petition for writ of error

Now comes the defendant, Roscoe Irwin, by Oliver D. Burden, United States attorney for the Northern District of New York, his attorney, and says that on the 25th day of October, 1922, this court entered judgment herein against this defendant in the sum of thirty thousand one hundred four and 70-100 dollars ($30,104.70), in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more fully appear from the assignment of errors which is filed with the petition.

Wherefore defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Second Circuit for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals aforesaid.

ROSCOE IRWIN,
Defendant.
By OLIVER D. BURDEN,
U. S. Attorney, Attorney for Defendant.

53 (Citation in usual form omitted in printing.)

54 In United States District Court

(Title omitted.)

Assignment of errors

Roscoe Irwin, defendant in the above-entitled cause, by Oliver D. Burden, United States attorney for the Northern District of New York, his attorney, in connection with his petition for writ of error, makes the following assignment of errors, which he alleges occurred in said cause:

1st. The District Court erred in holding that the payments received by the plaintiff from the trust estate created by the will of Anthony N. Brady were not taxable income within the meaning of the income tax act of October 3, 1913.

2nd. The District Court erred in holding that the payments received by the plaintiff from the trust estate created by the will of

Anthony N. Brady were a part of a bequest from Anthony N. Brady to the plaintiff and not income from the bequest.

55 3rd. The District Court erred in holding that the payments received by the plaintiff from the trust created by the will of Anthony N. Brady were capital and not income within the meaning of the sixteenth amendment to the Constitution of the United States and the income tax act of October 3, 1913.

4th. The District Court erred in overruling defendant's demurrer to the complaint.

ROSCOE IRWIN,
Defendant.
By OLIVER D. BURDEN,
U. S. Attorney, Attorney for the Defendant.

In United States District Court

(Title omitted.)

Clerk's certificate

I, C. W. Higgison, clerk of the District Court of the United States of America, for the Northern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

56 In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Utica, in the Northern District of New York, this 1st day of June, in the year of our Lord one thousand nine hundred and twenty-three, and of the independence of the said United States the one hundred and forty-eighth.

[SEAL.] (Signed) C. W. HIGGISON,
Clerk.

57 In United States Circuit Court of Appeals for the Second Circuit

No. 70. October Term, 1923

Argued November 13, 1923. Decided December 10, 1923

ROSCOE IRWIN, COLLECTOR OF INTERNAL REVENUE for the 14th district of New York, plaintiff in error v. E. PALMER GAVIT, DEFENDANT IN ERROR	In error to the District Court of the United States for the Northern District of New York.

Opinion

Before ROGERS, MANTON, and MAYER, *Circuit Judges.*

Writ of error to the United States District Court for the Northern District of New York, action by E. Palmer Gavit, plaintiff, against Roscoe Irwin, collector of Internal revenue for the fourteenth dis-

trict of New York, defendant, to recover income tax and penalties assessed against his income under act of Congress of October 3, 1913, for the years 1913, 1914, and 1915, which was paid by him under protest. Judgment for plaintiff. Defendant appeals. Affirmed

58 Oliver D. Burden, Esq., United States District Attorney, for plaintiff in error.

Neile F. Towner, Esq., attorney for defendant in error.

MANTON, *Circuit Judge*:

The complaint sets forth in separate causes of action, claims for taxes and penalties assessed and paid under the 1913, 1914, and 1915 income tax laws. The total amount is $21,602.16. Judgment was demanded for this amount with interest and costs. The plaintiff in error demurred on the ground that the complaint failed to state facts sufficient to constitute a cause of action. This demurrer was overruled and judgment entered as demanded in the complaint.

One Anthony N. Brady died leaving a will which provided, among other things, as follows:

"All the rest, residue and remainder of the real and personal property of which I may die, seized and possessed, I direct my executors and trustees to divide into six equal parts and I give, devise, and bequeath the same as follows:

* * * * * * *

"One part, to my executors and trustees, in trust, nevertheless, for the following uses and purposes, to wit: To collect and receive the rents, income, and profits thereof and after paying all necessary expenses to dispose of the net rents, income, and profits thereof as follows: I direct my executors and trustees to apply so much of said net rents, income, and profits as they, in the exercise of their absolute discretion, shall deem proper for the maintenance, education, and support during her minority, of my granddaughter,

59 Marcia Ann Gavit, and I direct my executors and trustees in fixing the amount of said allowance to consider the station in life of my said granddaughter, my desire being that she shall be amply and liberally provided for in every way. All income to be applied to the maintenance, education, and support of my said granddaughter and may be either so applied by my executors and trustees directly, or may in their discretion be paid by them to the guardian of the person of said minor, and the receipt of such guardian shall be full and complete discharge to them for all moneys so paid by them to such guardian. The balance of said net rents, income, and profits shall be divided into two equal parts: One of the said parts shall be paid to my son-in-law, Erastus Palmer Gavit, in equal quarterly payments during his life. The other moiety shall be accumulated for the benefit of my said granddaughter. Upon the death of my said granddaughter before she attains her majority, whether her father be then living or not, I give, devise, and bequeath the capital of said trust estate to her issue in equal shares, per stirpes, and if she leaves no issue, whether her father be then living or not, I

give, devise, and bequeath said capital to my issue, share and share alike, per stirpes. When my granddaughter attains the age of twenty-one years, whether her father be then living or not, and whether she then has living issue or not, I direct that said trust shall cease, and I give, devise, and bequeath the capital of said trust estate to my said granddaughter, her heirs and assigns forever."

Under this provision of the will, the defendant in error was entitled to share in the balance of the net rents, income, and profits which was to be divided into two equal parts, one of the said parts to be paid to the defendant in error in equal quarter yearly payments during his life. The plaintiff in error treated the moneys
60 so received during the years 1913, 1914, and 1915 as income under the income tax law, whereas the claim of the defendant in error is that it was a legacy and hence not taxable. The act of October 3, 1913 (38 Stat., 114–116) which is applicable is as follows:

"A. Subdivision 1. That there shall be levied, assessed, collected, and paid annually upon the entire net income arising and accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned, and of every business, trade, or profession carried on in the United States by persons residing elsewhere.

"Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied, assessed, and collected upon the net income of every individual an additional income tax (herein referred to as the additional tax) or 1 per centum upon the amount by which the total net income exceeds $20,000 and does not exceed $50,000, and 2 per centum per annum upon the amount by which the total net income exceeds $50,000 and does not exceed $75,000, 3 per centum per annum upon the amount by which the total net income exceeds $75,000 and does not exceed $100,000, 4 per centum per annum upon the amount by which the total net income exceeds $100,000 and does not exceed $250,000, 5 per centum per annum upon the amount by which the total net income exceeds $250,000 and does not exceed $500,-
61 000, and 6 per centum per annum upon the amount by which the total net income exceeds $500,000. All the provisions of this section relating to individuals who are to be chargeable with the normal income tax, so far as they are applicable and are not inconsistent with this subdivision of paragraph A, shall apply to the levy, assessment, and collection of the additional tax imposed under this section.

"Every person subject to this additional tax shall, for the purpose of its assessment, and collection, make a personal return of his total

net income from all sources, corporate or otherwise, for the preceding calendar year, under rules and regulations to be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury.

"B. That subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and incomes derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rents, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent."

Under the provisions of this will, the defendant in error received a certain portion of the increase of the estate of the testator for a definite period, that is, until the testator's gronddaughter,
62 Marcia Ann Gavit, who was the daughter of the defendant in error, attained the age of twenty-one years, at which time the entire one-sixth part of the trust estate bequeathed under this portion of the will was given to her absolutely. The gift to the defendant in error was further limited by the life of his daughter, for the will provided that if she died prior to attaining the age of twenty-one, defendant in error was to receive no further sums whatsoever under the will and the entire trust estate went to the issue of his daughter, if any, otherwise to the issue of the testator.

A bequest is a conditional or unconditional voluntary disposition of personal property by will. (Merriam v. United States, 282 Fed. 851, aff'd. Supreme Court Nov. 12, 1923.) In the Merriam case, where the 1913 income tax, subdivision (b) was considered, providing for a tax upon gains, profits, and income derived from or

> "growing out of the ownership or use of or interest in real or personal property, also from interest, rents, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever including the income from but not the value or property acquired by gift, bequest, devise or descent,"

it has held to indicate an intention on the part of Congress to make the words "acquired by gift, bequest, devise, or descent" an exception in the taxing act, rather than an exemption. The words of the statute used in the exemption clause of the act, provide that income shall include all gains derived from compensation from the various sources except property acquired by request or devise. Undoubtedly, the testator intended a legacy to the defendant in error. The gift received by the defendant in error is measured by the increase of
63 the corpus of the estate, but this does not change the status of his position and what he receives continues to be a legacy or be-

quest and he is still a legatee. But it is urged by the plaintiff in error that instead of receiving a definite sum or a definite portion of the corpus of the estate, the gift ceased to become a legacy and became income because it was paid as received from the earnings of the corpus of the trust fund. A sum of money invested under the terms of a will, the income of which is paid to the testator's son for life and at his death, the principal to a third party, is a legacy under the New York law. (In the Matter of Stanfield, 135 N. Y. 292.) So amounts paid periodically to a beneficiary instead of in a lump sum, have been held to be legacies when so paid. (United States v. Fidelity Trust Co., 222 U. S. 158.) Amounts received by beneficiaries out of the increase of the corpus of the testator's estate, are gifts or bequests. (Westus v. Union Trust Co., 154 Fed. 795; Lynch v. Union Trust Co., 164 Fed. 161.) Income has been defined by the Supreme Court as a gain derived from capital, from labor or from both combined provided it is understood to include profit or gain through a sale or conversion of capital assets. (Eisner v. Macomber, 252 U. S. 189; Doyle, etc., v. Mitchell Bros. Co., 247 U. S. 179.) If this was solely a gift from the testator which came to him through a period of not to exceed fifteen years (since his daughter was but six years of age), the fact that the amount was not definitely known and was not measured by a different method that a fixed share of the corpus of the estate, can not alter its character as a gift or bequest. Nor is Smietanka v. First Trust & Savings Bank (257 U. S. 602) in conflict with this statement. There it was provided that income from a trust fund for the benefit of unborn and unascertained beneficiaries, was not made taxable by any language in the income tax of October 3, 1913. It is said:

64 "There was nowhere in the act a payment required of a fiduciary of a tax upon the income of the estate or trust property, the income from which he collects, except as it is to enure to the benefit of a person or an individual from whose income he is authorized and required to deduct the normal tax thereon."

That action was brought agains unborn persons so that whether or not the amount received was income as to them was not decided. The trustees were held entitled to recover the entire income tax, both normal and supertax, which they had paid.

We are satisfied that the bequest to the defendant in error was not income under the act of 1913 and under section 2 (b) this sum is expressly excepted in determining what his income is for the purpose of taxation as the act provides that net income of a taxable person shall not include the value of property acquired by gift, bequest, devise, or descent. (Merriam v. United States, supra.) What in its nature is not income can not be made such merely by Congress calling it such. (Towne v. Eisner, 245 U. S. 425.) Under the act of October 3, 1913, the levy, assessment, and payment is upon the net income of any person residing in the United States, though not a citizen thereof under section (a), subdivision 1. And under subdivision 2, "individuals" are charged with the normal tax and every "person" subject to additional tax must make a "personal" return and the net income of a taxable "person" is defined in sec-

tion (b). There is nothing in the act which makes an estate a "citizen" or a "person" and the income of an estate is therefore not taxable. The 1916 act indicated a congressional intention to levy and impose an income tax upon an estate (39 Stat. 753; §2, act of 1916; 39 Stat. 756). The fact that the prior act is amended by the 1916 enactment demonstrates the intent to change the
65 pre-existing law and the presumption is that it was intended to change the statute in all particulars touching which we find a material change in the language of the act. (United States v. Bashaw, 50 Fed. 752; reversed in the Supreme Court on other grounds, 152 U. S. 456.) The 1916 act omits the provision in the act of 1913 which in defining income excludes the "value of property acquired by gift, bequest, devise, or descent" (act of 1916, chap. 463, §3) and it makes a new provision for returns by trustees (§8) and provides for an estate tax (§200), indicating that the latter act enlarged the scope of the internal revenue law. It is argued here that because paragraphs D and E, subdivision 2, of the act of 1913, provide that a guardian or trustee withhold a sum sufficient to pay the normal tax imposed under the act, that the income from the trust fund such as here becomes taxable. But these provisions were undoubtedly inserted to safeguard the Government in obtaining the income of persons from property which they have by gift, bequest, devise, or descent, where the property is temporarily in the possession of the fiduciaries. Oftentimes the beneficiary does not obtain the corpus or capital of the property which he received under the will until some some time after the right thereto is created. During this period, income accrues and the intent of the law is that the trustee shall render a return and pay the normal tax of persons subject to the tax. Here, the defendant in error is not subject to the tax and received no part of the corpus of the estate so that the sections referred to do not apply. In Merchants Loan & Trust Co. v. Smietanka (255 U. S. 509) in construing the act of 1916, it was held that by provisions of the income tax law of that year, a testamentary trustee is a taxable person indicating that it was only under such section that such trust became taxable. And again in Smietanka v. First Trust & Savings Bank (267 U. S. 602) the court said:
66 "In the act of 1913, it would have been easy to require a trustee to pay an income tax on income received by him for unborn beneficiaries or for the trust or the estate, but Congress did not do so. In the next act it did so. We cannot supply the omission in the earlier act."

While the moneys received by the defendant in error are income as to the estate, they are not income as to the defendant in error. We think that he acquired the moneys by bequest or devise and they are not taxable.

Judgment affirmed.

67–68 In United States Circuit Court of Appeals

(Title omitted.)

Judgment, Dec. 17, 1923

Error to the District Court of the United States for the Northern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Northern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

H. W. R.
M. T. M.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

69 In United States Circuit Court of Appeals

Clerk's certificate

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 68, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Roscoe Irwin as collector, etc., plaintiff in error, against E. Palmer Gavit, defendant in error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 1st day of March in the year of our Lord one thousand nine hundred and twenty-four and of the independence of the said United States the one hundred and forty-eighth.

WM. PARKIN,
Clerk.

70 Supreme Court of the United States

Order granting petition for certiorari, April 14, 1924

On petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1924

ROSCOE IRWIN, FORMER COLLECTOR OF Internal Revenue, petitioner
v.
E. PALMER GAVIT
No. 325

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

THE FACTS

Anthony N. Brady died prior to 1913, leaving a will which, among other things, established a trust of one-sixth of the residue of his estate for the purpose, primarily, of providing from the income thereof for the maintenance, education, and support, during her minority, of his granddaughter, Marcia Ann Gavit (daughter of E. Palmer Gavit). The trust further provided that any balance of the income of said estate remaining after the granddaughter had been adequately provided for should be divided into two equal parts, one to be paid to E. Palmer Gavit in equal quarter-yearly payments during his life, and the other to be accumulated for

the benefit of Marcia Ann Gavit. The trust was to terminate upon the death of the granddaughter, if she died before attaining her majority, in which event the entire capital of the trust estate was to go to her issue, if any, and if she left no issue to the issue of the testator. In any event, the trust was to terminate when the granddaughter reached the age of twenty-one years and the entire capital of the trust estate was then given to her. (R. 14.)

E. Palmer Gavit received substantial amounts of the income of this estate during the years 1913, 1914, and 1915, upon which the trustees failed to withhold the normal tax, and he, Gavit, failed and refused to pay either the normal or additional tax. As the result of such failure and refusal, taxes, additional taxes (or surtaxes), and penalties amounting in all to $21,602.16 were assessed and collected under the Income Tax Act of 1913. This action was instituted by Gavit to recover the amount paid with interest and costs. (R. 12.) The District Court gave judgment for the plaintiff in the sum of $30,104.70 (R. 19), and on writ of error (R. 27) the Circuit Court of Appeals for the Second Circuit affirmed the judgment (R. 35).

The Circuit Court of Appeals held that the moneys received by Gavit, while income as to the trust (although not taxable to the trust under the decision of this Court in *Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602) were as to Gavit legacies which, under Section II–B of the Income Tax Act of 1913, *infra,* were expressly excepted in

determining a person's net income for the purpose of taxation. (R. 34.)

Petitioner contends that the moneys paid to Gavit each quarter from the income of the trust were income derived by him from the trust and as such were specifically taxable under the provisions of Section II–B of the Income Tax Act of 1913, *infra*.

QUESTION PRESENTED

Where, under the terms of a trust created by will, periodical payments are made to a beneficiary out of the income of the corpus of the trust estate, are the amounts received taxable as income in the hands of such beneficiary even though he may not be entitled to receive any part of the corpus which yields the income?

STATUTE INVOLVED

The Income Tax Act of October 3, 1913 (38 Stat. 114, 166), provides in part as follows:

SECTION II

> A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon *the entire net income arising or accruing from all sources* in the preceding calendar year *to every citizen of the United States,* whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, * * *.
>
> Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax) there

shall be levied, assessed, and collected *upon the net income of every individual* an additional income tax (herein referred to as the additional tax) of 1 per centum per annum upon the amount by which the total net income exceeds $20,000 and does not exceed $50,000. [Here follow higher rates upon higher incomes.]

B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits *and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent* * * *.

D. * * *; guardians, trustees, * * *, and all persons, * * * acting in any fiduciary capacity, shall make and render a return *of the net income of the person for whom they act, subject to this tax,* coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals * * *.

E. * * * All persons, * * * in whatever capacity acting, including * * * trustees acting in any trust capacity, * * * having the control, receipt, custody, disposal, or payment of interest, rent, salaries, wages, * * * or other fixed or determinable annual gains, profits, and income of another person, exceeding $3,000 for any taxable year, other than dividends on capital stock, or from the net earnings of corporations and joint-stock companies or associations subject to like tax, who are required to make and render a return in behalf of another, as provided herein, to the collector of his, her, or its district, are hereby authorized and required to deduct and withhold from such annual gains, profits, and income such sum as will be sufficient to pay the normal tax imposed thereon by this section, and shall pay to the officer of the United States Government authorized to receive the same; and they are each hereby made personally liable for such tax. * * *

ARGUMENT

I

What Gavit received was income, taxable at normal and surtax rates under Section II of the Income Tax Act of 1913

The direction of the donor to his trustees was to collect and receive the "*rents, income, and profits*" thereof and after paying all necessary expenses to

dispose of the "*net rents, income, and profits*" thereof as follows:

> I direct my executors and trustees to apply so much of said *net rents, income, and profits* * * *. The balance of said *net rents, income, and profits* shall be divided into two equal parts: One of the parts shall be paid to my son-in-law, Erastus Palmer Gavit, in equal quarter yearly payments during his life. The other moiety shall be accumulated for the benefit of my said granddaughter.

The donor then provided for the disposition of the "capital of said trust estate" upon the termination of the trust.

The courts below reached the fanciful conclusion that a man cannot receive the income from capital unless he owns the capital. If given the annual crops of a farm, the proceeds would not be his "income," unless he owned the farm in fee.

Such a conclusion, we submit, ignores the plain provision of the Act, the common sense of the very practical problem of taxation, and the common understanding of men. They graft an unwarranted limitation upon Paragraph B of Section II of the Act, which expressly taxes:

> *income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent* * * *.

Could words be plainer?

Nowhere in the statutes or adjudicated cases can there be found any authority for the proposition that gains to be income must be derived from the taxpayer's *own* labor or capital nor do the standard works on economics contain any such suggestion. On the contrary, Section II–B of the 1913 Act very clearly includes within the definition of taxable income " gains, profits, and income * * * growing out of the ownership or *use* of or *interest* in real or personal property." This provision specifically includes gains derived from the " use " as well as the ownership of property, and also from " interest in " property not necessarily involving ownership. One having a *legal right* to the accretions of a certain amount of capital has *income derived from capital,* and it is immaterial that the capital is not and never can become his own property.

It would surprise the man in the street, for whom taxing laws are made, to learn that if he were given, for a period of fifty years, the net profits of a great building or a great business that he was not in respect to the annual payments for that period of time in receipt of an annual income. Indeed, it is difficult to understand why an income tax should be levied upon the annual income from property which the taxpayer owns in fee, and should not be levied upon one who receives such income, even though he does not own the property in fee. The important fact is the income, not its source.

36709—25——2

If a testator were to leave a valuable piece of property to one of his sons, with the understanding that he should receive one-half of the income, but should pay the other half to his brother, on the theory of the lower court the first son would pay a tax, but the second son would be exempt. This seems to do violence to the purpose of the income tax laws.

They were the result of a political revolution. The American people had determined that they would no longer raise the vast sums necessary for the support of the Government wholly from consumption or excise taxes. They believed it to be more equitable that every man should pay according to his ability, and that ability was to be measured by the amount of his income.

In determining the nature of such income, the law purposely excluded such an isolated and nonrecurring gift as a legacy. It was not income in the proper sense of the word. It was an accidental receipt, which might never happen again; and while it might be spent by the happy beneficiary as though it were income, it was more likely to become a part of his principal. When, however, a trust is created, which continuously yields income, and that income and not the corpus is given to a beneficiary, the latter naturally regards the ever-recurring receipts of money as a part of his income; and it was certainly the income which Congress had in mind in determining his relative ability to contribute to the Government, for not only did

the Sixteenth Amendment tax income "from whatever source derived," but the law provided a tax upon "income derived from any sources whatever, including *the income from* but not the value of property acquired by gift, bequest, devise, or descent."

It seems to us difficult for Congress to have expressed its meaning more comprehensively or clearly. The value of the property "which is given in trust" by a gift or devise is not taxable, as it happens in the nature of the case only once, but the income from that property is taxable in the hands of the beneficiary without regard to the technical ownership of the trust fund. Any other conclusion would lead to extraordinary results. If charities were not exempt, then, if a bequest of $100,000,000 were made to a charity in perpetuity, the income of that trust fund would never for all time be income within the meaning of the statute, and this would seem to be a *reductio ad absurdum*.

Such a definition is clearly at variance with the plain intendment of the Act, and if permitted to stand would result in the exemption of all income received by beneficiaries of trust estates, who do not share in the distribution of the capital assets. This would deprive the Government of an exceedingly large amount of revenue and result in large sums of money and holdings of property being transferred in trust, in order to secure for the beneficiaries thereof tax-free income.

The decision of this Court in the case of *Maguire* v. *Trefry,* 253 U. S. 12, directly refutes the contention that earnings of capital, in order to be income to the recipient thereof within the meaning of the Income Tax Act of 1913 and the Sixteenth Amendment to the Constitution of the United States, must be a gain derived from a capital or corpus actually owned by the recipient of the income.

In *Maguire* v. *Trefry,* this Court held that a Massachusetts statute providing for a tax upon incomes (Gen. Statutes, Massachusetts, 1916, c. 269, Secs. 9, 11) applied to the income of a resident of the state from a trust administered under the laws of another state in securities in the possession of the trustee in such other state, because the beneficiary had an equitable right, title, and interest distinct from the legal ownership.

Speaking for this Court in *Maguire* v. *Trefry, supra,* Mr. Justice Day quoted with approval the following language of the Chief Justice of the Supreme Judicial Court of Massachusetts:

> " The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. * * * It is true of the present tax, as was said by Chief Justice Shaw in *Bates* v. *Boston,* 5 Cush. [Mass.] 93, at page 99, ' The assessment does not touch the fund, or control it; nor does it interfere with the trustee in the exercise of his proper

> duties; nor call him, nor hold him, to any accountability. It affects only the income, after it has been paid by the trustee ' to the beneficiary."
>
> We see no reason to doubt the correctness of this view of the nature and effect of the Massachusetts statute, and shall accept it for the purpose of considering the federal question before us * * *. [253 U. S. 12, 14.]

Mr. Justice Day said further, and his language is distinctly applicable to the facts in the case at bar:

> It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title and interest distinct from its legal ownership. " The legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly, or in part, to others." 2 Story's Equity, 11th Ed., Sec. 964. It is this property right belonging to the beneficiary, realized in the shape of income, which is the subject-matter of the tax under the statute of Massachusetts. [253 U. S. 12, 16.]

In *Merchants' Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509, the income of a testamentary trust was held taxable under the Revenue Act of 1916,

and this Court, after referring to its previous definitions of income, said that (p. 519):

> There can be no doubt that the word [income] must be given the same meaning and content in the Income Tax Acts of 1916 and 1917 that it had in the Act of 1913.

The lower courts, in the case at bar, recognized that the "rents, income, and profits" of the trust estate created by the will of Brady, were income to the trust (*Merchants' Loan & Trust Co.* v. *Smietanka, supra*), but held that they were not income to the beneficiary, Gavit. Their metamorphosis from income to capital or from taxable income to nontaxable income during their passage from trustee to beneficiary is not explained. Can such verbal legerdemain be imputed to a practical Congress in imposing a practical law? But if the word "income" has the same meaning under the 1916 Act as it has under the 1913 Act, *Merchants' Loan & Trust Co.* v. *Smietanka, supra*, is authority for the proposition that bequests of income of a testamentary trust are taxable. The widow of Ryerson, in the *Merchants' Loan & Trust Co. case* had only a life interest, and no capital interest in the trust fund, which upon the death of the life tenant was to go to the children of the testator. So far as the accumulations of income by the trust were concerned, it was not regarded of any importance whether the beneficiaries owned any part of the corpus or not.

The 1913 Act as well as the later Acts taxes the *income*, but not the value, of property acquired by gift, bequest, devise, or descent. What was taxed in the hands of Gavit was not the value of his inheritance, but the income derived therefrom. Gavit never received his income from Brady, because it was not in existence when Brady died. It had to be earned before it could be paid to him, and if the corpus of the trust had earned nothing, Gavit would have received nothing.

The Income Tax Act of 1913, Par. A, Subd. 1, levies a normal tax of one per cent upon the entire yearly net income arising from all sources accruing to every citizen of the United States and to every person residing in the United States, though not a citizen thereof. In Subd. 2 of Par. A, an additional or surtax is levied on the net income of every individual. Under Par. G, the normal tax imposed on individuals is extended to corporations. Paragraph B defines "net income" of individuals and specifies the exemptions and deductions. Paragraph D makes provision for returns by persons and then says:

> Guardians, trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations, or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the pro-

> visions of this section which apply to individuals * * *.

Paragraph E provides that, among others, all lessees or mortgagors of real or personal property, trustees acting in any trust capacity, executors, administrators, agents, receivers, or conservators, having control, receipt, custody, disposal or payment of annual gains, profits and income of another person, exceeding $3,000 for any taxable year, who are required to make return in behalf of another, shall deduct the normal tax on the income and pay it to the United States, and they are each made personally liable for such tax. It is further declared that these payments of the tax at the source shall only apply to the normal tax thereinbefore imposed on individuals.

There is no disputing the fact that Gavit was a person subject to the tax under the foregoing provisions; that what he received answers to the description of net income in every respect; and it is submitted that the tax should have been paid by the trustees *withholding the normal tax* and Gavit paying the *surtax*. Such is the effect of the decision of this Court in *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602, 605, in which the Court said:

> It is obvious from a reading of the statute, the relevant provisions of which we have summarized, that Congress was seeking to require fiduciaries to make return and pay the normal tax due from persons subject to the tax on such income as the fiduciaries

were receiving for such persons. There was nowhere in the act a payment required of the fiduciary of a tax upon the income of the estate or trust property, the income from which he collects, except as it is to enure to the benefit of a person or an individual from whose income he is authorized and required to deduct the normal tax thereon. There must have been a taxable person for whom the fiduciary was acting to make the provisions relied upon by the Government applicable. There was no provision for the payment " at the source " by the fiduciary of anything but the normal tax. It was intended that the additional or surtax should be paid by the *cestui que trust*. Here there was no *cestui que trust* to pay a surtax.

This Court held that the Income Tax Act of 1913 made no provision for taxing income held and accumulated by a trustee *for unborn and unascertained beneficiaries*. The same statute was involved there as here. The same years were involved, i. e., 1913, 1914, and 1915. The said case likewise involved a testamentary trust. But the question was whether the income of the trust, *accumulated for the benefit of unborn and unascertained persons*, was taxable to the trustee. Here the question is *whether income distributed periodically to a living and ascertained beneficiary is taxable to him*.

The Act of September 8, 1916, c. 463, 39 Stat. 757, specifically declared that the income accumulated

in trust for the benefit of unborn or unascertained persons should be taxed and assessed to the trustee, and under said Act as amended (Act of October 3, 1917, c. 63, 40 Stat. 331) trustees were required to render a return of the income of the person, *trust, or estate* for whom or which they act. *Merchants' Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509. There is nothing in either opinion of this Court (*Smietanka* v. *First Trust & Savings Bank, supra,* and *Merchants' Loan & Trust Co.* v. *Smietanka, supra*) even faintly suggesting that the income of testamentary trusts is or was totally exempt or excepted from taxation as a gift or legacy.

The error of the Circuit Court of Appeals lies in confusing the income from a legacy with the legacy itself. Under the Act the former is taxed as income while the latter is not. What Gavit in fact took under Brady's will was a vested beneficial interest in the trust estate, enforceable in a court of equity, and which consisted of the right to receive, under certain conditions, a portion of the income of said trust estate. On this *interest or use* there was no tax because he received it as a bequest. On the other hand, what income Gavit received from the trustees of the estate was taxable. It falls squarely within the provisions of Section II–B of the Income Tax Act of 1913, defining net income as including " gains, profits, and income * * * growing out of the ownership *or use of or interest in* real or personal property * * *

including the income from * * * property acquired by gift, bequest, devise, or descent." The reasoning of this Court in the case of *Maguire* v. *Trefry,* 253 U. S. 12, distinguishing between ownership and equitable interest in the same property, should be controlling in the case at bar on this point.

Gavit's interest in the trust fund was "property," the "value" of which is exempt from tax as income because received as a bequest. As stated by Rugg, C. J., in the case of *Raymer* v. *Trefry,* 239 Mass. 410, 413, "'Property' is a word of large import. It has been interpreted as including the right to make contracts for labor and for personal service." Nor is it material that Gavit's participation in the income of the trust was contingent; his interest vested upon the death of the testator. The general policy of the law and the rules of interpretation require that legacies in all cases, unless clearly inconsistent with the intention of the testator, should be held to be vested, rather than contingent. The fact that the enjoyment is uncertain never interferes with the vesting of an estate. When the contingency is not in the person, but in the event when enjoyment shall commence, or in the time of the enjoyment, the interest is considered vested. *Neilson* v. *Bishop,* 45 N. J. Eq. 473.

"Income" from capital must be, not capital, but the proceeds of capital. A gift or bequest of capital assets even if payable in installments is not "income." Here not a portion of the capital assets

forming the corpus, but certain of the earnings thereof, passed to the *cestui que trust*. The *cestui que trust* has an interest in the corpus, because he is legally entitled to receive whatever income is given him and must have the right to enforce payment if it is wrongfully withheld. If he has no such right, then each payment becomes a mere gratuity because each is an act of grace. To illustrate, I may give to my daughter from time to time and as and when it accrues the interest on certain bonds which belong to me. This interest so given is not "income" in the hands of my daughter, because I may withhold it at will, and, hence, each payment of interest is a gift. But if I create an irrevocable trust and turn over those bonds to a trustee with the provision that she shall have the interest therefrom through a term of years, or for life, then such interest is "income," because she has a legal right thereto and may enforce payment thereof in accordance with the terms of the trust. It is this *right* to the income which gives the *cestui que trust* a legal interest in the corpus. It is the right *in* the corpus, though not *to* the corpus, which we assert makes the usufruct "income" within the statute.

Nor is this conclusion one which is arrived at by a process of abstract reasoning. As has been seen, the act of 1913 specifically taxes income "growing out of the ownership or use of *or interest in* real or personal property." Therefore, it must inevitably

follow that if Gavit had an "interest in" the corpus, the proceeds thereof coming into his hands were taxable income.

In denying that the *cestui que trust* had any interest in the principal the lower courts ignored the law of the State of New York as to trust estates. The District Court thought that Gavit had no substantial or tangible right because the trustees, in their discretion, might have devoted all the proceeds of the corpus to the support of Marcia Ann Gavit, leaving nothing for him to take. The answer is obvious. The trustees did exercise their discretion each year and, after so doing, there did remain a surplus of earnings, one-half of which then belonged to Gavit. The trustees had no option but to turn it over to him. It was his. Had they failed so to do, he could have sued to compel due performance of the trust. The substantiality of that interest can not be argued away because of any fancied analogy with vested and contingent remainders in property. It is provided by *Section 100 of the Real Property Law of New York* that the trustee takes the whole estate and that the *cestui que trust* shall have a right of action to compel the enforcement of the trust. This same rule applies to trusts of personal property. *Williams* v. *Thorn,* 70 N. Y. 270; *Townshend* v. *Frommer,* 125 N. Y. 446; *Matter of Van Kleeck,* 95 Misc. 40, affd. 177 App. Div. 917. The right so to enforce is declared to be a chose in action. *Schenck* v. *Barnes,* 156 N. Y. 316. In *Met-*

calfe v. *Union Trust Company,* 181 N. Y. 39, it was argued that the right of a *cestui que trust* to take proceeds from corpus during life or until remarriage was not an estate or substantial interest. The Court of Appeals of the State of New York rejected this doctrine and said (p. 44):

> Although the legal estate is in the trustee, he but possesses a naked right, which is to be exercised, not for his own benefit, but for that of another. His estate is commensurate with the trust duties imposed upon him and it ceases when they are performed, or when they are at an end. The whole beneficial proprietorship, or interest, is in the *cestui que trust,* for whom he holds the estate and who has the right to enforce the performance of the trust.

The statutes and the decisions thereunder make no distinction between the interest of a *cestui que trust* which is absolute or which is contingent upon some condition. In either case he has a beneficial proprietorship in the corpus and whenever there are proceeds from that corpus, to which, under the trust, he becomes entitled, he has a right given by the statute to compel the payment to him. Even if no usufruct had ever actually become due to Gavit he would have had the right to sue the trustees if they were wasting the corpus. Therefore it is plain that the *cestui que trust,* E. Palmer Gavit, does have a substantial interest in the corpus of the estate, so that even under the limitations laid down

in the opinion of the court below he was in receipt of " income."

II

The cases cited by the Circuit Court of Appeals are inapplicable

Too much weight has been given to the decision of the Court of Appeals of New York in the case of *In Re Stanfield's Estate,* 135 N. Y. 292 (decided October 4, 1892), *United States* v. *Fidelity Trust Co.,* 222 U. S. 158 (decided December 4, 1911), *Westhus* v. *Union Trust Co.,* 164 Fed. 795 (decided November 4, 1908), and *Lynch* v. *Union Trust Co.,* 164 Fed. 161 (decided October 5, 1908). None of these cases had anything to do with tax on income, or the exemption from taxation as income of money or property received by gift, bequest, devise, or descent.

In the matter of *Stanfield's Estate, supra,* Hugh M. Stanfield, as beneficiary under the will of Mark M. Stanfield, deceased, was given the income of $20,000 for life, and the executor was directed by the will to invest $20,000 for such use in bonds and mortgages or Government bonds. He petitioned for an order directing the payment of interest on the amount of income devised to him. The Supreme Court granted the order (18 N. Y. Supp. 913), which was affirmed by the Court of Appeals, the affirmance being accompanied by the opinion which has been so strongly relied upon by E. Palmer Gavit in support of the proposition that the income

paid to him from the Brady estate was exempt from taxation.

We submit that such reliance is not well grounded. The question in *Stanfield's case* was not whether what the distributee received was income or a legacy for the purposes of his income tax, but whether he was entitled to receive said income from the date of the death of the testator. It was held that the beneficiary was entitled to the income on said $20,000 from the date of the testator's death and that it was not subject to the rule that general legacies shall not bear interest until the expiration of one year from the grant of letters testamentary or of administration. The court held that the rule by its terms was limited to general legacies payable out of the corpus of the decedent's estate.

The cases of *Westhus* v. *Union Trust Co.*, 164 Fed. 795, *Lynch* v. *Union Trust Co.*, 164 Fed. 161, and *United States* v. *Fidelity Trust Co.*, 222 U. S. 158, cited by the learned Circuit Court of Appeals in support of the proposition that each annual payment to Gavit from the income of the trust estate constituted a legacy, arose under the War Revenue Act of June 13, 1898, c. 448, Sec. 29, 30 Stat. 464, and the so-called " Refunding Act " of June 27, 1902, c. 1160, Sec. 3, 32 Stat. 406. The " Refunding Act" provided for the refunding of such taxes "as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two," and that no tax should be assessed under said Section 29 in

respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to July 1, 1902. These cases afford little support to the position of respondent.

In *Westhus* v. *Union Trust Company, supra,* the testator died December 11, 1901, leaving a will whereby after payment of his debts and certain specific legacies he bequeathed all his property to a trust company in trust, with direction that the net income of the trust estate, after a deduction not material here, should be divided into three equal parts called A, B, and C, respectively. This case has to do only with part C. The will provided that the trust company should pay the net income represented by part C to the testator's son, Charles A. Madill, at least semiannually during his life time, with remainders after his death to other persons upon various contingencies. The will denied the testator's son, who was the beneficiary of part C of said trust, all right or power to anticipate his portion of the income or to sell, pledge, hypothecate, or otherwise encumber the same before the trust company had actually paid it to him. There was like denial of control over the principal or corpus of the trust property, and neither income nor corpus was to be subject to the payment of his debts. In short, testator's son had no *ownership* whatever in the *corpus* of the estate. His bequest was simply the right to receive income therefrom.

The Circuit Court of Appeals for the Eighth Circuit held that under the above-mentioned stat-

utes testator's son received a life estate in the income of the trust property, which became absolutely vested in enjoyment at once on the death of the testator and subject to the tax. This is clearly a holding that the testator's son received a "bequest," although, like Gavit in the case at bar, he received from the testator no part of the *corpus* of the trust fund, or *ownership* therein, but only a right to receive the income thereof. The court said:

> We think the bequest to Charles A. Madill was absolutely vested in enjoyment at the death of the testator. The right of the legatee to the enjoyment of the income was not postponed to the end of a precedent estate, nor was it made to depend upon the happening of any contingency or uncertain event. A present and immediate right passed to him, not subject to devestment short of his death. The interest which passed by the will and in respect of which the tax was imposed was an ordinary life estate in the income of property held in trust, and the beneficiary was a person in being. The intervention of a trustee between the legatee and the physical handling of the corpus of the estate is unimportant in this connection. True, the precise amount of the income depended upon the amount or value of the corpus of the trust property, the definite ascertainment of which might have to await the payment of debts and the preparation of schedules, but such an uncertainty no more makes a bequest of income contingent than does the

> fluctuation of rates of interest upon the invested funds of the trust estate. [*Westhus* v. *Union Trust Company*, 164 Fed. 795, 797, 798.]

In *Vanderbilt* v. *Eidman*, 196 U. S. 480, the income of a residuary estate was to be paid to a son of the testator while he was between 21 and 30 years of age. He was then to receive one-half of the principal and the income on the balance until he was 35 and then the balance was to be given into his possession. *The tax was duly paid upon the right to the beneficiary's enjoyment of the income*, as provided by the Act of 1898, and the controversy arose over the subsequent exaction by the Government of a tax on his right to succeed to the whole residue if he lived to the ages of 30 and 35 years, respectively. The Court held that the deferred rights were not vested in possession or enjoyment and were therefore not subject to the tax. The case is only pertinent here in respect of the general acquiescence in the liability to the tax of *the bequest of the income* in trust for the son. To that extent it supports our proposition that the bequest of a right to receive income is a legacy and the annual accretions to the legatee growing out of such right or interest in property is income.

In the case of *Disston* v. *M'Clain*, 147 Fed. 114, the testator gave the residue of his estate to trustees—

> to keep the same invested in such securities as I may have or to invest the same as

> they may determine, and from the income arising from all my said estate to pay first to my beloved friend, Rachael Asch, the sum of fifteen thousand dollars per year during all the term of her natural life.

The Circuit Court of Appeals for the Third Circuit held that the estate of a testator was not subject to the payment of a legacy tax under said War Revenue Act of June 13, 1898, as a legacy of an entirety for life merely because a fixed income for life was to be paid to a beneficiary out of the whole income of the real and personal estate in the hands of trustees, but in such case the specific payments only were taxable as the same from time to time became due and payable to the legatee. The court very properly distinguished such a case from one where a beneficiary is given an equitable interest in a certain fixed part of the corpus of the estate, as in the *Westhus case* and as in the case at bar. The court said:

> * * * it must be observed again, that the express bequest of all the income, be it more or less, from the entire residuary personal estate, during a definite period, differs widely, as regards the question here presented, from the bequest of a definite sum to be paid yearly out of the income of both real and personal estate, collected by the trustees. [*Disston* v. *M'Clain*, 147 Fed. 114, 120, 121.]

The reason why the court, in *Disston* v. *M'Clain*, held that each separate payment to the beneficiary

was a separate bequest was because there was no sum given to the trustees or set apart by the will, the income of which was to be paid to Rachael Asch. *There was nothing definite or capable of being made definite as to the source from which the income was to be derived.* The court made this clear throughout its opinion, particularly on pages 117 and 118, in the following language:

> To sustain the action of the collector, we have to ignore the fact that there is no gift to Rachael Asch of a definite sum, as an entirety, other than the quarterly payments which the trustees of his residuary estate, real and personal, are directed to make out of the income thereof, year by year, during the term of her life. Nor is any sum given to the trustees or set apart by the will, the income of which, whatever it may be, is to be for the use of Rachael Asch. To create the corpus of a legacy, the income of which will supply these definite quarterly payments, would impose upon the trustees the necessity of setting apart such an amount of money as would, in their judgment, produce the income, thus creating a principal sum or corpus which the testator has not seen fit to create in the shape of a legacy * * *.
>
> There is nothing definite or capable of being made definite as to the source from which the income is derived. Presumably the income collected by the trustees was more than sufficient to make these definite payments. Neither the personal estate nor real estate is bequeathed and devised as an

> entirety for the raising of these sums. The character of the bequest is not to be determined by the adventitious relation of the amount of the personalty to that of the realty, or by the requirement of the Pennsylvania law as to the primary application of the personalty, or by the more or less amount of income derived from the personalty. It might have happened that the testator's personal estate had been so invested as to yield an income more than sufficient to make the payments in question. The mere fact that it was found so invested as that the income was not adequate for that purpose, can not impose a different legal character upon this provision of the testator's will, or authorize the collector to consider the whole personal estate as a legacy and taxable as an entirety, and for that purpose to ascertain its value as a life interest. Such a construction of the revenue act of 1898 is, we think, unwarranted by its plain language and unsupported by any authoritative interpretation of it.

The case of *Lynch* v. *Union Trust Company, supra,* is analogous to that of *Disston* v. *M'Clain;* indeed, it was said by the court to be "exactly on all fours" with it. It will not, therefore, be commented upon in detail here.

It is also to be noted that the court in *Disston* v. *M'Clain* distinguished *Vanderbilt* v. *Eidman, supra,* on the grounds that the same question was not involved, and even if it was—

> the express bequest of all the income, be it more or less, from the entire residuary personal estate, during a definite period, differs widely, as regards the question here presented, from the bequest of a definite sum to be paid yearly out of the income of both real and personal estate, collected by the trustees. [*Disston* v. *M'Clain,* 147 Fed. 114, 120, 121. See also *Herold* v. *Shanley,* 146 Fed. 20.]

It is respectfully insisted that the foregoing decisions under the War Revenue Act of June 13, 1898, are not in point. There the question was as to the construction of an inheritance tax law—here it is the construction of an income tax law, involving radically different considerations. In those cases the question was not "what is the legacy, and what the income therefrom," but whether the so-called legacy met the definition of the Act there involved. As stated by the court in *Disston* v. *M'Clain, supra,* at page 122:

> The statute nowhere refers in express terms to the interest or income of a legacy, nor does it impose any tax in respect thereto, before it is actually received. If the act had intended that the interest in a fixed and definite income for life, payable out of personalty alone, much more in such an income payable *out* of the total income of the whole residuary real and personal estate, should be taxed, this intention would not be left to inference, but would be clearly expressed and a mode of estimating such an interest would be prescribed, as, for example, has been done

> in the collateral inheritance tax laws of the States of New York and New Jersey. In this statute, there is no mode provided for valuing such an income given to a person for life.

So the decisions under said Act are to be considered in connection with the definitions and limitations of the Act itself, and are not aptly applied to a question of income tax arising under the Act of 1913, which taxes "the income from but not the value of property acquired by gift, bequest, devise, or descent."

Although not apparent from the record, it seems to be a fact that Gavit's interest in the Brady estate was taxed by the State of New York as an inheritance at a present value of $2,731,972.00. But even if it had been impossible to have determined the value of Gavit's right or interest at the time of Brady's death, that difficulty should give us little concern here. We know that it was a valuable right or interest and resulted in large amounts of annual income, which income is the subject of this suit. It is the rule under the New York Inheritance Tax law that in cases where there is a technical vesting of a future estate, which is liable to be defeated before it comes into actual enjoyment, as well as where there is no such contingency, the tax is upon the interest of each legatee, according to its value, and collectible out of his interest only. (*In re Hoffman's Estate,* 143 N. Y. 327; *In re Curtis,* 142 N. Y. 219; *In re Roosevelt's Estate,* 143 N. Y. 120; *In re Westurn's*

Estate, 152 N. Y. 93; see also *In re Cager's Will,* 111 N. Y. 343.)

III

The effect upon the Income Tax Acts of 1916, 1918, 1921, and 1924

The most important aspect of the decision of the Circuit Court of Appeals is not the obvious error in this particular case, but the serious and far-reaching effect upon the whole income-tax system of the Government. Under the Revenue Acts of 1916, 1918, and 1921, testamentary trusts are taxable persons and beneficiaries thereof are taxable on their distributive shares. The effect of the decision of the Circuit Court of Appeals is to exempt from taxation the income received by beneficiaries of testamentary trusts where the beneficiary does not own the corpus of the trust estate. Most trusts are testamentary, and many of them create life estates in persons who are not remaindermen. Consequently the decision, if unreversed, may be held equally applicable to the later Acts so far as distributive shares of income are concerned. Already, in fact, the decision is being urged as determinative of the identical question in many cases now pending before the Treasury Department and the courts under the later Acts.

Section 215 (b) of the Revenue Act of 1921, specifically provides that (42 Stat. 242):

> Amounts paid under the laws of any State, Territory, District of Columbia, possession

> of the United States, or foreign country as income to the holder of a life or terminable interest acquired by gift, bequest, or inheritance shall not be reduced or diminished by any deduction for shrinkage (by whatever name called) in the value of such interest due to the lapse of time, nor by any deduction allowed by this Act for the purpose of computing the net income of an estate or trust but not allowed under the laws of such State, Territory, District of Columbia, possession of the United States, or foreign country for the purpose of computing the income to which such holder is entitled.

This provision is a legislative recognition of the scope and intent of prior laws rather than a change in such laws. *United States* v. *Coulby,* 251 Fed. 982, affirmed 258 Fed. 27.

In this connection attention is respectfully invited to a letter dated November 3, 1919, from the Secretary of the Treasury to the Chairman of the Committee on Ways and Means of the House of Representatives, relative to the provision which was finally enacted as Section 215 (b) of the 1921 Act. (Notes on the Revenue Act of 1918, p. 11.) In that letter the Secretary stated that the proposed change was desired in order to clear from doubt the status of life interests or estates. He said:

> Certain State statutes and the decisions thereunder give color to the claim that the value of a life interest at the time received is such a capital value as may serve as the

> basis of deductions for obsolescence. If these claims be allowed, cases would arise in which a clear income from an unimpaired corpus, divided between a life tenant and remainderman, would entirely escape taxation—the income from the property being wiped out by the annual shrinkage or obsolescence of the so-called capital value of the life estate.

The foregoing amendment has to do principally with depreciation of life estates, but it shows a legislative intention to tax as income the proceeds of property held in trust, regardless of the ownership of the corpus.

Furthermore, in this connection, it is to be noted that all the Revenue Acts since 1913, not only tax the distributive shares of income of trusts to the beneficiaries, but also exempt from taxation "the value of property acquired by gift, bequest, devise, or descent." Hence, if, as held in this decision, a beneficiary's distributive share of the income of a trust estate, where he owns no part of the corpus, is not income, but a legacy, then the provision of said Acts taxing such distributive shares and the provisions exempting legacies from taxation are in hopeless conflict.

IV

Constitutional question involved

The Circuit Court of Appeals, while not expressly holding any specific part of the Income Tax Act of 1913 unconstitutional, in ruling that

what Gavit received under the Act was not income, but a legacy, cited *Towne* v. *Eisner,* 245 U. S. 418, to the effect that " What in its nature is not income can not be made such merely by Congress calling it such." This reference could only have been with respect to the fact that the Act taxes income from legacies regardless of the ownership of the corpus, and suggests the unconstitutionality of the Act. In brief, the suggestion is that a bequest of income can not be " income " under the Sixteenth Amendment, where the beneficiary owns no part of the corpus, and is not made income by Congress calling it such. Under this theory Congress has no power to tax the income from property acquired by gift or legacy where income is bequeathed apart from the corpus, but under such circumstances both the value of the property itself and the income therefrom are necessarily exempt. To this theory we can not subscribe.

The income from a legacy is taxable as income whether the legatee owns any part of the corpus or not. *Baltzell* v. *Casey,* 1 Fed. (2d) 29; affd. by the Circuit Court of Appeals, 1st Cir., Jan. 14, 1925, unreported to date.

There is no force in the argument that each annual payment to Gavit was a payment of capital. The value of his capital was not diminished one cent by all the payments to him. In fact, it appreciated during the years here involved, resulting in increased income to Gavit therefrom. That his expectancy of years of enjoyment diminished with

the lapse of time is immaterial; the value of the right or interest in the estate did not diminish.

As stated by Mr. Justice Pitney in *Stratton's Independence* v. *Howbert,* 231 U. S. 399, 415, with reference to such an argument:

> But the same is true of the earnings of the human brain and hand when unaided by capital, yet such earnings are commonly dealt with in legislation as income.

And in the case of *Merchants' Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509, 519, Mr. Justice Clarke said:

> In determining the definition of the word "income" thus arrived at, this court has consistently refused to enter into the refinements of lexicographers or economists and has approved, in the definitions quoted, what it believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution. *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, 185; *Eisner* v. *Macomber,* 252 U. S. 189, 206, 207.

There is, and always has been, ample power in Congress to tax income from whatever source derived. The Sixteenth Amendment added nothing to the existent power of Congress to tax. Indeed, the power was complete and required no enlargement. The amendment changed only a regulation of the Constitution as to the mode of exercising the power under particular circumstances. As pointed

out in *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 16, the conclusion reached by this Court in the case of *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 429; 158 U. S. 601,

> did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but on the contrary recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it.

In the *Brushaber Case* the Court further said (p. 17):

> Nothing could serve to make this clearer than to recall that in the *Pollock Case* in so far as the law taxed incomes from other classes of property than real estate and invested personal property, that is, income from " professions, trades, employments, or vocations " (158 U. S. 637), its validity was recognized; indeed it was expressly declared that no dispute was made upon that subject and attention was called to the fact that taxes on such income had been sustained as excise taxes in the past. *Id.*, p. 635. The whole law was however declared unconsti-

tutional on the ground that to permit it to thus operate would relieve real estate and invested personal property from taxation and " would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain, in substance, a tax on occupations and labor," (*Id.*, p. 637) a result which it was held could not have been contemplated by Congress.

This is the text of the Amendment:

" The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

The purpose of the amendment was stated clearly and succinctly by this Court in the *Brushaber case* (p. 18), as follows:

* * * the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment ~~from~~ a consideration of the source whence the income was derived. * * * there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock Case* was decided; that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which

> the income was derived, since in express terms the Amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment.

There is no force, therefore, in the argument that the income derived by Gavit from the Brady trust could not be taxed under the Constitution, unless it is on the ground that what he received was *not income*. If it be conceded that what he received was *income*, the constitutionality of the tax must be apparent: for, admittedly, the Congress has power to tax *all income, from whatever source derived.*

In the enactment of the 1913 Act there is every indication that Congress used the word "income" in its popular and broadest sense, "It being very clear that Congress intended in that act to exert its power to the extent permitted by the Amendment." (*Eisner* v. *Macomber,* 252 U. S. 189, 203.) And in *Lynch* v. *Hornby,* 247 U. S. 339, 343, 344, this Court said:

> * * * Congress was at liberty under the Amendment to tax as income, without apportionment, everything that became income, in the ordinary sense of the word, after the adoption of the Amendment * * *.

Congress has exercised its power by taxing the "*income from* * * * property acquired by gift, bequest, devise, or descent," but exempting the value of the property itself. The exemption was not by reason of lack of power to tax, and even

though it be made to appear that the income is the legacy, if it answers to the description of income, the Congress has complete power to tax it as income.

As heretofore stated, any exemption or deduction claimed by respondent must be by virtue of the taxing statute, and not by virtue of any constitutional limitation.

JAMES M. BECK,
Solicitor General.

CHESTER A. GWINN,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

APRIL, 1925.

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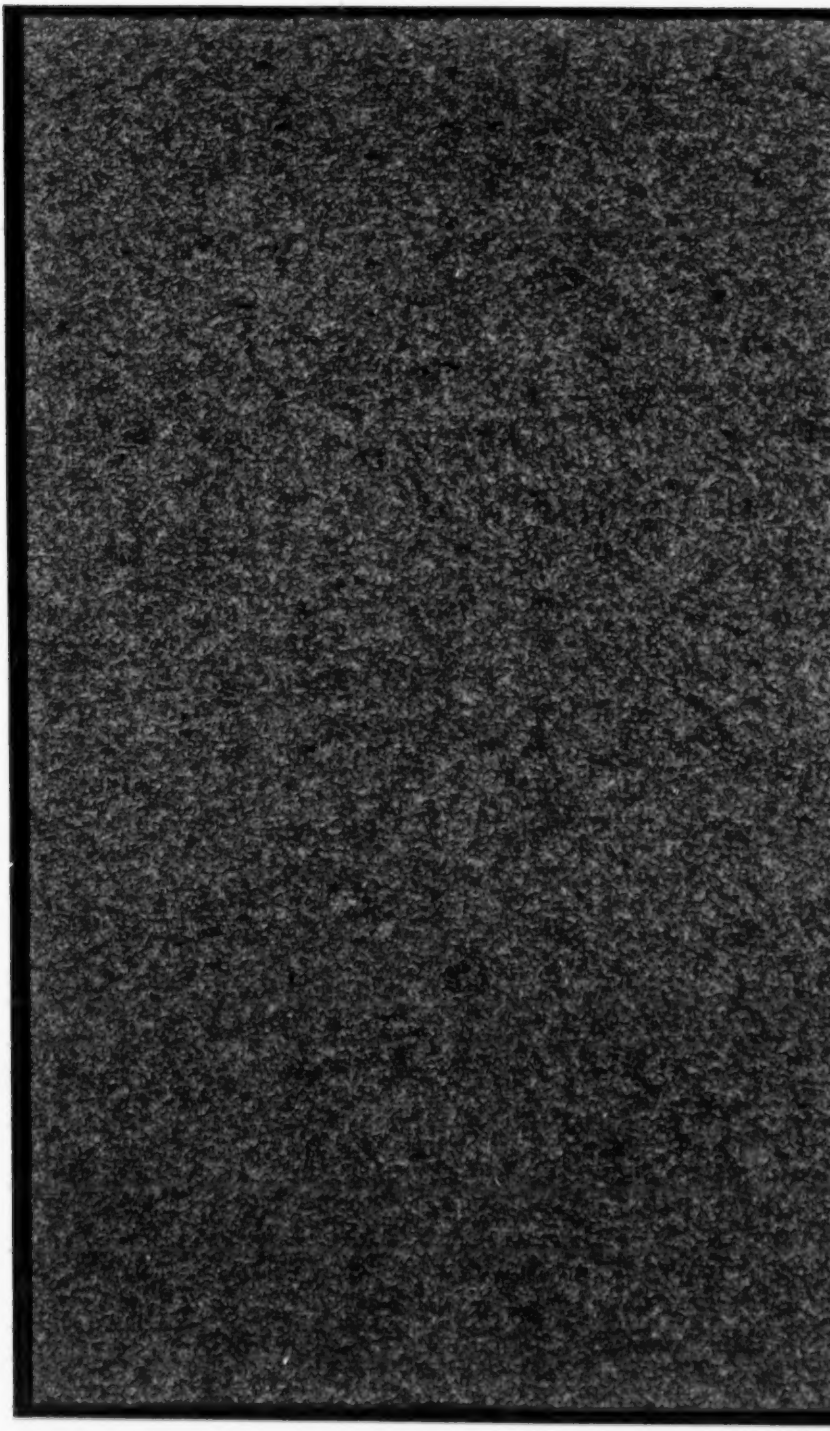

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1923.

No. 883.

ROSCOE IRWIN, Former Collector of Internal Revenue for the 14th District of New York,

Petitioner,

against

E. PALMER GAVIT,

Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari.

STATEMENT.

This is an application on behalf of the former Collector of Internal Revenue for the 14th District of New York for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals which affirmed a judgment in favor of the respondent recovered in the District Court of the United States for the Northern District of New York. (R. 36, 67.)

The action was brought by E. Palmer Gavit, the respondent, to recover from Roscoe Irwin, Collector of

Internal Revenue, 14th District of New York, the petitioner, certain income taxes and penalties assessed against individual income of the respondent under the Act of Congress of October 3, 1913, for the years 1913, 1914 and 1915, which were paid by the respondent under protest to said collector. (R. 2-34.) To this complaint the petitioner demurred upon the ground that the complaint failed to state facts sufficient to constitute a cause of action. (R. 34.) This demurrer, after argument, was overruled by the District Court and thereafter judgment was entered for the amount demanded in the complaint with interest and costs. (R. 35-36.) To such judgment, petitioner obtained a writ of error to the United States Circuit Court of Appeals, Second District, which affirmed the judgment, as aforesaid. (R. 50, 67.) The opinion of the District Court is reported in 275 Fed. Rep., 643, and that of the Circuit Court of Appeals is not yet reported.

Facts.

The complaint sets forth in detail in separate causes of action, the taxes and penalties assessed against Mr. Gavit and the payments made by him under protest. (R. 2-22.) The total amount of taxes and penalties so paid was twenty-one thousand six hundred and two dollars and sixteen cents ($21,602.16), and for this amount, together with interest, a judgment was demanded. (R. 22.)

It is alleged in each cause of action that various income tax returns for the respective periods were filed by the respondent with the collector, and that in each return he made the specific claim that all sums received by him from the Estate of Anthony N. Brady which were designated in said return, were a bequest and not income and not taxable and duly protested against any

tax being levied thereon. That the balance of his income exclusive of such bequest was not taxable within the provisions of said Act of Congress of October 3, 1913. That thereafter respondent received from time to time notices of and demands for the payment of said taxes claimed to be assessed upon his individual income, copies of said notices and demands being attached to the complaint. That he duly paid these taxes under protest and under duress, and with each payment filed a written protest, claiming that said tax was erroneously, illegally and wrongfully assessed against him in that said tax was based upon sums received by him during the period in question from the Estate of Anthony N. Brady, were not income and therefore, not taxable. That said tax was not a proper tax upon his income and was contrary to the letter and spirit of said Act of Congress of October 3, 1913. That respondent took various appeals to the United States Commissioner of Internal Revenue for the remission of the penalties and for the refunding of the taxes and penalties paid, upon the same grounds as stated in his protest. That these claims were disallowed and rejected. That the amounts set forth in the complaint as paid by the respondent were due and owing to him from the petitioner. (R. 2-22.)

There was annexed to and made a part of the complaint the seventh paragraph of the will of Anthony N. Brady in which is set forth the bequest to the respondent. (R. 25-27.) This paragraph provides as follows:

> "Seventh. All the rest, residue and remainder of the real and personal property of which I may die, seized and possessed, I direct my executors and trustees to divide into six equal parts and I give, devise and bequeath the same as follows:
>
> * * * * * *

One part, to my executors and trustees, in trust nevertheless for the following uses and purposes, to wit: To collect and receive the rents, income and profits thereof and after paying all necessary expenses to dispose of the net rents, income and profits thereof as follows: I direct my executors and trustees to apply so much of said net rents, income and profits as they in the exercise of their absolute discretion, shall deem proper for the maintenance, education and support during her minority, of my granddaughter, Marcia Ann Gavit, and I direct my executors and trustees in fixing the amount of said allowance to consider the station in life of my said granddaughter, my desire being that she shall be amply and liberally provided for in every way. All income to be applied to the maintenance, education and support of my said granddaughter may be either so applied by my executors and trustees directly, or may in their discretion be paid by them to the guardian of the person of said minor, and the receipt of such guardian shall be full and complete discharge to them for all moneys so paid by them to such guardian. The balance of said net rents, income and profits shall be divided into two equal parts: One of the said parts shall be paid to my son-in-law, Erastus Palmer Gavit, in equal quarter yearly payments during his life. The other moiety shall be accumulated for the benefit of my said granddaughter. Upon the death of my said granddaughter before she attains her majority, whether her father be then living, or not, I give, devise and bequeath the capital of said trust estate to her issue in equal shares, per stirpes, and if she leaves no issue, whether her father be then living or not,

I give, devise and bequeath said capital to my issue, share and share alike, per stirpes. When my granddaughter attains the age of twenty-one years, whether her father be then living, or not, and whether she then has living issue, or not, I direct that said trust shall cease, and I give, devise and bequeath the capital of said trust estate to my said granddaughter, her heirs and assigns forever."

POINT I.

The sums received by E. Palmer Gavit, respondent, under the will of Anthony N. Brady, deceased, were a bequest or gift, and not income, and no income tax should be imposed thereon under the Act of Congress of October 3, 1913.

The petitioner, by his demurrer, raised solely one question which is the only question before the court, namely, were the sums received by Mr. Gavit from the Estate of Anthony N. Brady under his will, income or were such amounts a bequest or gift? If income, the income tax was properly assessed against same and the demurrer should have been sustained. If a gift, or bequest and not income, these amounts were not taxable and the demurrer was properly overruled.

During the period in question, the Act of 1913 was in force and the provisions of that Act, as far as applicable to the present case, are as follows:

"Section II:

"A. Subdivision 1. That there shall be levied, assessed, collected, and paid annually upon the entire net income arising or accruing from all

sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of one per centum per annum upon such income, except as hereinafter provided * * *.

"Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied, assessed, and collected upon the net income of every individual an additional income tax (herein referred to as the additional tax) of one per centum per annum upon the amount by which the total net income exceeds $20,000 and does not exceed $50,000." (Here follows percentages of additional tax.)

* * * All the provisions of this section relating to individuals who are to be chargeable with the normal income tax, so far as they are applicable and are not inconsistent with this subdivision of paragraph A, shall apply to the levy, assessment, and collection of the additional tax imposed under this section."

"B. That * * * the net income of a taxable person shall include * * * gains or profits, and income derived from any source whatever, including the income from, *but not the value of* property acquired by gift, bequest, devise, or descent." (The italicized words are omitted from the quotation in petitioner's brief, page 6.)

"D. * * *; guardian, trustees, executors * * *, and all persons, * * * acting in any fiduciary capacity, shall make and render a

return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals; * * *.

"E. * * *, All persons, * * * in whatever capacity acting, including * * * trustees acting in any trust capacity, executors * * * having the control, receipt, custody, disposal, or payment of interest, rent, salaries, wages, * * * or other fixed or determinable annual gains, profits, and income of another person, exceeding $3,000 for any taxable year, other than dividends on capital stock, or from the net earnings of corporations and joint-stock companies or associations subject to like tax, who are required to make and render a return in behalf of another, as provided herein, to the collector of his, her or its district, are hereby authorized and required to deduct and withhold from such annual gains, profits and income such sum as will be sufficient to pay the normal tax imposed thereon by this section, and shall pay to the officer of the United States Government authorized to receive the same; and they are each hereby made personally liable for such tax. * * *"

It is important first to consider just what Mr. Gavit received under the will of Anthony N. Brady. The intent of the portion of the will quoted is very clear and definite. That is, the respondent was bequeathed a certain portion of the increase of the estate of the testator for a definite period; that is, until the granddaughter of the testator, Marcia Ann Gavit, who is the daughter of the respondent, attained the age of twenty-

one years at which time the entire one-sixth part of the trust estate bequeathed under said portion of the will was given to her absolutely. The gift to Mr. Gavit is further limited by the life of said Marcia Ann Gavit, as the will provided that if said granddaughter, prior to attaining the age of twenty-one, died, respondent was to receive no further sum whatsoever under the will as the entire trust estate went to the issue of said Marcia Ann Gavit, if any, otherwise to the testator's issue.

What, then, did Mr. Gavit receive from the estate of Anthony N. Brady? A legacy and a bequest are held to be synonymous terms and are properly used to distinguish a gift of personalty made by a testator from a devise which is a gift of realty. (In re Campbell's Estate, 75 Pac. Rep., 851, 853.) A bequest is a conditional or unconditional voluntary disposition of personal property by will. (Merriman v. United States, 282 Fed. Rep., 851, aff'd United States Supreme Court, U. S. Adv. Ops., 1923-1924, at 48.) Under these well recognized definitions, it cannot be held that Mr. Gavit did not receive a gift or bequest under the will of Anthony N. Brady, because it can be nothing else.

It is urged, however, that because, instead of receiving a definite sum or a definite portion of the corpus of the estate, he received part of the increase, his gift ceased to be a legacy and became income. This contention we believe is unsound when we bear in mind that we are considering this proposition, not from the viewpoint of the estate or the testator's executors and trustees, but from the viewpoint of Mr. Gavit.

There is ample authority for our contention that as far as a beneficiary is concerned, the fact that the gift he receives from a testator is measured by the increase of the corpus of the estate, does not change the status of his position and what he receives, continues to be a legacy or bequest and he continues to be a legatee.

In Disston v. McClain (147 Fed. Rep., 114), a trust was created under a will from the income of which a beneficiary was to receive fifteen thousand dollars annually, the principal of the trust reverting to other parties on the beneficiary's death, and the court clearly stated that this gift was a bequest to the beneficiary.

In United States v. Fidelity Trust Company (222 U. S., 158), which overruled Disston v. McClain, just cited, in regard to the time when the enjoyment of the interest of the beneficiary actually began, this court recognized that amounts paid periodically to a beneficiary were legacies to her.

In Westhus v. Union Trust Company of St. Louis (164 Fed. Rep., 795), and Lynch v. Union Trust Company of St. Louis (164 Fed. Rep., 161), where the same question arose as to the time when the interest of a beneficiary vested which was to be paid to him out of the interest of a trust fund, the court in the opinions stated that the beneficiary received a bequest or a legacy and referred to such beneficiary as a legatee.

While these cases last cited involve another statute not applicable here, they are called to the court's attention to emphasize the fact that as far as the beneficiary is concerned, amounts received by him out of the increase of the corpus of the testator's estate are a gift or bequest and not income.

In Matter of Stanfield (135 N. Y., 292), where an executor under the will of a testator, was directed to invest a sum of money and pay the income to the testator's son for life and at his death the principal to a third party, the Court of Appeals specifically held that this gift constituted a legacy to the beneficiary.

This last case is not cited as authority on the tax question here before this court, but as to the construc-

tion given by a high court to a similar gift, so that what is said in petitioner's brief (page 7) has no application.

Assume, for instance, in this case that the testator had directed one hundred fifty thousand dollars to be paid to the respondent in fifteen annual installments which would be approximately the period as in this case since Marcia Ann Gavit was six years old at the time of the testator's death, there is no question but that such gift would be considered as a bequest. Assume further, that the testator had divided his estate into six equal parts and directed his executors to pay to the respondent a portion of one of said parts in fifteen equal annual installments. It still could not be urged that this was not a bequest and it would have mattered not as far as the beneficiary was concerned whether the executors had obtained these installments from the corpus of the testator's estate at the time of his death or from any accumulations thereon. In either case, as far as the beneficiary was concerned, he would be in receipt of a bequest and not income.

It follows logically from this last assumption to the present case where the testator provided that instead of giving any part of the corpus of his estate to the respondent, he directed that a certain percentage of the corpus should be set aside and that the respondent should receive a certain portion of the interest on such trust fund for a period ending when his daughter attained the age of twenty-one or upon her death, if she died before reaching that age. Certainly, the respondent is in no different position, had he received money from an estate under any of the assumed cases. It was solely a gift from the testator which came to him during the period of not to exceed fifteen years. The fact that the amount was not definitely known and was measured by a different method than a fixed percentage of the corpus of the estate, cannot alter the character of this gift as a bequest.

The case of Smietanka v. First Trust and Savings Bank (257 U. S., 602), in which it was held by the Supreme Court of the United States that income from a trust fund for the benefit of unborn and unascertained beneficiaries was not made taxable by any language in the income tax law of October 3, 1913, was cited as authority here that the bequest received by Mr. Gavit was income, because the statement is made in the opinion in that case that "there was nowhere in the act a payment required of a fiduciary of a tax upon the income of the estate or trust property, the income from which he collects, except as it is to enure to the benefit of a person or an individual from whose income he is authorized and required to deduct the normal tax thereon." (Page 605.) From this statement it was urged that there was in effect a holding that the sums received by Mr. Gavit in this case were not a bequest but income.

We insist that this decision is not authority for such contention that the bequest to Mr. Gavit was income. As the court below said: "That action was *not** brought against the unborn persons, so that whether or not the amount received was income as to them was not decided. The trustees were held entitled to recover the entire income tax, both normal and super tax, which they had paid." Furthermore, it is apparent from the decision that the corpus of the trust fund as well as the accumulations were to go to such beneficiaries, which presents an entirely different situation from the present case. Had Mr. Gavit been bequeathed one-half of the principal of the trust fund when his daughter became of age and in the meantime was to receive the interest and income on said principal, through the trustees, until

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* Obviously omitted.

such time, an entirely different situation would be presented.

It is precisely this distinction that the District Judge pointed out when quoting from the Supreme Court of the United States (Eisner v. MacComber, 252 U. S., 189, 206, 207), he defines income as " the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets," and further quoting from the same opinion, stated: " The fundamental relation of ' capital ' to ' income ' has been discussed by the economists, the former being likened to the tree on the land, the latter to the fruit or the crop; the former being depicted as a reservoir supplied from springs; the latter as the outlet stream, to be measured by its flow, during a period of time." Bearing in mind this distinction, the District Judge called attention to the fact that none of the moneys received by Mr. Gavit arose from any capital of his, but from the capital or a portion of the estate of Anthony N. Brady which would never be that of the respondent. That Mr. Gavit had certain rights to this portion of the estate is true, but this right, as pointed out by the court, might be extinguished and to call such right property or capital was held unreasonable. (R. 42-44, 47-48.)

We failed to see any application in the case of Maguire v. Trefry, 253 U. S. 12, cited by petitioner (page 6). In that case a State statute which specifically taxed income received by a resident of Massachusetts from trustees, non-residents of that State, was held by this court to be constitutional. Here, we do not question the constitutionality of the statute, but merely contend that the statute does not cover this particular case. Whether or not Mr. Gavit could enforce the payment of his legacy in equity or elsewhere, is entirely immaterial.

What we wish to emphasize is Mr. Gavit's relations to the money which he received from the estate of Anthony N. Brady. As the court below said, whether or not these amounts are income as far as the trustees for the estate are concerned, matters not. It is Mr. Gavit who is seeking to recover a tax erroneously assessed as an income tax upon the amount of a bequest made to him. If the court is satisfied that this was a bequest to Mr. Gavit, and not income, under the Act of 1913, Section 2-B, this sum is expressly excepted in determining what his income is for the purposes of taxation as the act provides that the net income of a taxable person shall not include "the value of property acquired by gift, bequest, devise or descent." (Merriam v. United States, 282 Fed. Rep., at 855, affm'd United States Supreme Court, *supra.*)

Our contention is somewhat borne out by a statement made by this court in Knowlton v. Moore (178 U. S. 41), in construing the income tax of 1894, where the court said: "The tax was *eo nomine* an income tax, but was in one respect the legal equivalent of a legacy tax since among the items going to make up the annual income which was taxed, was 'money and the value of all personal property acquired by gift or inheritance.'" (Page 52.)

Had this gift or bequest to Mr. Gavit come under the provisions of an income tax law similar to the Act of 1894, unquestionably the same must have been included in his income, but as he is taxed under the Act of 1913, this bequest is just as clearly excluded since the Act of 1913 as quoted above, excludes in practically the same language bequests which are included in the Act of 1894.

POINT II.

The income on this trust fund set aside under the will of Anthony N. Brady was not taxable under the Act of October 3, 1913.

A conclusive answer to the contention that although this gift might not be income as far as respondent himself was concerned, it was income as far as the estate was concerned and hence taxable, is that the income of an estate was not taxable under the Act of 1913 where there was no person in receipt of such income, simply as income.

The Act of 1913 can be searched in vain for any provision which makes such income taxable. Such a case as the present one is clearly omitted. The levy, assessment and payment is upon the net income of a "*citizen*" (Section A, subdivision 1). "*Individuals*" are charged with a normal income tax and every "*person*" subject to the additional tax must make a "*personal*" return (Section A, subdivision 2). The net income of a taxable "*person*" is defined. (Section B.) There is nothing in the Act which makes an "*estate*" a "*citizen*" or a "*person,*" and the income of an estate is therefore not taxable.

Congress evidently recognized that no income tax could be levied upon an estate under the Act of 1913, because under the Act of September 8, 1916, a provision was enacted which imposed an income tax upon an estate. We quote the pertinent portions of said Act of 1916 as follows (39 Stat. 756, Title I, Part I, Section 2):

> "(b.) Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their

estates, and also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be;

Provided, That where the income is to be distributed annually or regularly between existing heirs or legatees, or beneficiaries, the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed.

Such trustees, executors, administrators, and other fiduciaries are hereby indemnified against the claims or demands of every beneficiary for all payments of taxes which they shall be required to make under the provisions of this title, and they shall have credit for the amount of such payments against the beneficiary or principal in any accounting which they make as such trustees or other fiduciaries."

While not conclusive, it is a very strong evidence of Legislative intent that when an amendment is made to a law, so as to include matters not embraced in the original act, the original act did not include such additional matters.

As the court below said, "The fact that the prior act is amended by the 1916 enactment, demonstrates the intent to change the pre-existing law and the presumption

is that it was intended to change the statute in all particulars touching which we find a material change in the language of the act (United States v. Bashaw, 50 Fed. Rep., 754; reversed in the Supreme Court on other grounds, 152 U. S., 456.)"

The Revenue Act of 1918 (40 Stat. 1057, Title II, Part II, Sect. 219a), and the Revenue Acts of 1921 (42 Stat. 227, Title II, Section 219a), specifically tax the income received by estates of deceased persons during the period of administration.

Referring to subdivision 2, Paragraphs D and E of the Act of 1913, under which it is provided that a guardian or trustee withhold a sum sufficient to pay the normal tax imposed under the act, petitioner argued in the court below that because of such provisions the income from a trust fund, such as here, became taxable. The court below clearly explained that "these provisions were undoubtedly inserted to safeguard the government in obtaining the income of persons from property which they have by gift, bequest, devise or descent, where the property is temporarily in the possession of fiduciaries. Oftentimes the beneficiary does not obtain the corpus or capital of the property which he received under the will until some time after the right thereto is created. During this period income accrues and the intent of the law is that the trustees shall render a return and pay the normal tax of persons subject to the tax. Here, the defendant-in-error is not subject to the tax and received no part of the corpus of the estate, so that the sections referred to, do not apply."

In Merchants Loan and Trust Company v. Smietanka (255 U. S., 509), the Supreme Court of the United States, in construing the Act of 1916, expressly held that by the provisions of the income tax law of that year (section 2-B) above quoted, a testamentary trustee is a

taxable person, indicating that it was only under such section that such trustee became taxable. In a later case Smietanka v. First Trust and Savings Bank (257 U. S., 602), explaining the decision just mentioned the court said: "In the Act of 1913, it would have been easy *to require a trustee to pay an income tax on income received by him* for unborn beneficiaries or *for the trust or the estate, but Congress did not do so.* In the next act it did so. We cannot supply the omission in the earlier act." (P. 607.)

This decision completely refutes the argument that under the Act of 1913 this tax might be assessed against the trust estate because as to such trust estate, the amount received was income, and the tax passed along, as it were, for Mr. Gavit to pay. As the income of this trust fund was not taxable under the Act of 1913, and as it ceased to become income when turned over to Mr. Gavit and was simply a bequest, the same was not taxable under said Act of 1913.

POINT III.

No convincing reasons shown for granting the petition.

It follows from the above points that the court below did not err in the construction which it placed upon section II-B of the Revenue Act of 1913, namely, that this particular bequest to Mr. Gavit was not taxable as income under said Act, and it is respectfully urged that no good reasons are shown for granting this application and prolonging this litigation. It is not contended that there are any claims for refund now pending under said Act of 1913 for which the present case can be used as a precedent, and the period has long since passed within which any such claims can be filed. Apparently, the sole reason presented by the Solicitor General is that a

decision be given by this court in this case so that the same can be used as a precedent in numerous claims for refunds where income taxes were paid by trustees or beneficiaries under beneficiary trusts, pursuant to the Revenue Acts of 1916, 1918 and 1921. As already pointed out, the Act of 1916 and subsequent acts radically changed the laws with reference to imposing a tax on the income received by trustees for trust estates so that nothing that can be decided here can be controlling in the construction of said acts. This is clearly indicated in the opinion of the court below. We can confidently assert that the government will in any subsequent litigation involving such later revenue acts, insist that the decision here has no bearing in such cases for the very reasons set forth in this brief. Since, therefore, this is an isolated case under the Act of 1913 in no wise bearing on the construction which may be placed on the later statutes of 1916, 1918 and 1921, the reason urged for granting this application has no force.

As far as any constitutional question is concerned, this is merely incidental. It was not urged in the court below and is not urged now that this act is unconstitutional. It was merely contended and upheld by the court that this money received by Mr. Gavit from the estate, even though it might be income as far as the estate was concerned, was not income as to Mr. Gavit, but was a bequest and not taxable and that which in its nature was not income, could not be made income by merely calling it such.

The court below, quoting from Smietanka v. First Trust and Savings Bank, *supra,* indicated how Congress could have taxed this income and called attention to its omission to do so. It was not, therefore, the want of power on the part of Congress, but the failure to act.

Conclusion.

As the money received by Mr. Gavit was a bequest and as this court has held that a bequest is not taxable under the Act of 1913 (United States v. Merriman, *supra*), and as this court has further held that income received by trustees was not taxable under said Act of 1913 (Smietanka v. First Trust and Savings Bank, *supra*), there is really no open question, the doctrine of *stare decisis* applies and the granting of this application is unnecessary.

It is respectfully submitted that this petition for writ of certiorari should be denied.

March 29, 1924.

NEILE F. TOWNER,
Counsel for Respondent.

FILED
APR 18 1925
WM. R. STANSBURY
CLERK

No. 535

In the

Supreme Court of the United States

October Term, 1924

BOSCOE IRWIN, Former Collector of Internal Revenue,
Petitioner,

against

E. PALMER GAVIT,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF

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IN THE

Supreme Court of the United States

ROSCOE IRWIN, Former Collector of Internal Revenue, *Petitioner,* against E. PALMER GAVIT, *Respondent.*	No. 325 October Term, 1924.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF

The undersigned respectfully move the Court for leave to file the accompanying brief in this case as *amici curiae.*

This application is made as counsel for Mabel Brady Garvan, a beneficiary under the seventh paragraph of the will of Anthony N. Brady, being the same will and the same paragraph under which respondent takes. The provision made by said will for Mrs. Mabel Brady Garvan is as follows:

> "SEVENTH. All the rest, residue and remainder of the real and personal property of which I may die seized or possessed, I direct my executors and trustees to divide into six equal parts, and I give, devise and bequeath the same as follows:
>
> * * * * * *

> "One part, to my executors and trustees, in trust, nevertheless, for the following uses and purposes, to-wit: To collect and receive the rents, income and profits thereof and after paying all necessary expenses to pay over the same to my daughter, Mabel Brady Garvan, in equal quarter-yearly payments during her life. Upon her death, if her husband Francis P. Garvan survives her, I direct that said net rents, income and profits be paid to him during his life, and upon the death of the survivor of my said daughter and her said husband, I give, devise and bequeath the capital of said trust estate to her issue, share and share alike, per stirpes, and if she leaves no issue living at the termination of the trust, to my issue, share and share alike, per stirpes."

Large sums were assessed as income taxes against Mabel Brady Garvan, under the Federal Tax Act of 1913, on the payments made to her under the above provision of said will, on the claim that said payments constituted taxable income to her; the taxes so assessed were paid by her under protest. The question presented by her protest arises out of the same will, relates to the same residuary fund created by paragraph seventh of said will; and therefore she has in fact just as vital an interest in the case as does respondent.

WHEREFORE, leave to file the accompanying brief is respectfully requested.

JOHN W. DAVIS,
FRANK DAVIS, JR.,
Counsel for Mrs. Mabel Brady Garvan.

IN THE

Supreme Court of the United States

ROSCOE IRWIN, Former Collector of Internal Revenue, *Petitioner,* against E. PALMER GAVIT, *Respondent.*	October Term, No. 325 1924.

BRIEF IN SUPPORT OF RESPONDENT

The Questions Presented

The question is—whether money paid to a beneficiary from year to year for a certain period or for life pursuant to a bequest of net income, said beneficiary having no present or future interest in the corpus of the fund which creates such income, is taxable as income to such beneficiary under the 1913 income tax law.

The estate—capital—which produces the rents, income and profits so payable to the beneficiary is in the hands of trustees. The beneficiary under the laws of New York has no right, title or interest in said capital other than to be paid the income thereof during a certain period, which right cannot be anticipated or assigned; he has no control whatever over the capital fund and at a certain time, by the terms of the will, it goes to other persons therein designated. This is then simply a bequest of rents, income and profits—a gift of the same.

The broad contention of the Government is that the yearly payments of the rents, income and profits so bequeathed or given, constitutes taxable income of the beneficiary.

We maintain—

1. That the money received by respondent is property acquired by bequest; a legacy.

2. The legacy received by respondent, being property acquired by bequest, is expressly excepted from taxable income by Section II, B of the 1913 Act.

3. The legacy to respondent consisted of the moneys to be paid to him from time to time under the terms of the will and not of a mere naked right to receive them.

4. Under the laws of the State of New York the respondent had neither ownership nor use of nor interest in the corpus of the testator's estate. His title was in the income in that alone.

5. That the income is collected by the trustee is immaterial.

6. To construe the Income Tax Law as applying to a legacy would make it to that extent unconstitutional.

7. The construction sought by the Government would make the Act arbitrarily discriminatory. Such construction is to be avoided if possible.

ARGUMENT

I.

The money received by respondent is property acquired by bequest, a legacy.

The tax here concerned is charged against the beneficiary on money received by him during the taxable year. Obviously, the first step in considering the validity of the tax is to determine accurately the character of the fund sought to be taxed, as the money constituting the same is from time to time received into the hands of the taxpayer. This is done by ascertaining from what source such money is derived and how it comes to the recipient. There can be no doubt as to this; it comes to him by virtue of a will and in no other way; it is a bequest of the earnings or the increase, during a certain period, of a capital fund which belongs to someone else. It is therefore a bequest, a gift, for a bequest is a gift of personal property made by will. "The word 'bequest' is commonly defined as a gift of personal property by will * * *". *United States* v. *Merriam* (1923), 263 U. S. 179, 184. Legacy and bequest so far as this case is concerned are interchangeable terms; as there is no claim made that the bequest is made in payment of a debt or for services to be rendered. It is a pure gratuity.

> "In common acceptation, 'bequest' and 'legacy' are synonymous terms, but 'bequeath' is the term generally by which a gift of personalty is made in a will, and a legacy is the money or personal property bequeathed." (*In re Campbell's Estate* (1904), 27 Utah 361, 75 Pac. 851, 853, *Page on Wills,* (2).

There can be no doubt that money, payable quarterly under a will to a beneficiary for a certain period is a

pure bequest, legacy or gift. No other character can possibly be attributed to it. While this is so plain as to require no support from authority, such authority exists and is of absolute uniformity.

> "Within the limits of the rule against perpetuities the law recognizes the right of the testator to dispose of the income of his property by will, and gifts of this sort are constantly upheld. And where testator manifests a clear intention, he may give the income separate and apart from the principal, so that the beneficiary has no interest whatever in the property from which the income is derived.
>
> The intention to separate the income from the principal is generally manifested either by creating an express trust or by limiting the interest to a life interest in the income only." *Page on Wills,* Page 691, §599, and cases there cited.

In the Matter of Stanfield (1892), 135 N. Y. 292, 31 N. E. 1013, there was a bequest to the son of the testator of the income for life on a fund of $20,000.00; at his death said fund to go to another. The Court, in its opinion, states (pp. 294, 295, 297):

> "Where the income of an estate, or of a designated portion, is given to a legatee for life, we think it is clear that he becomes entitled to it whenever it accrues, and, if the estate is productive of income from the death of the testator, he can require the executor to account to him for the income from that time. * * * In the present case the bequest is not of a part of the principal of the estate, or of any property possessed by the testator in his lifetime; but of that which is to arise or accrue after his death from a specified fund to be set apart for that purpose. It is the income which constitutes the respondent's legacy. He is not seeking to charge the estate with interest upon his legacy, but is simply endeavoring to secure the legacy itself and his effort, therefore, involves no

infringement of the rule regulating the payment of interest upon general legacies.

"It is argued that the bequest of the income to the respondent and of the principal sum, out of which it is to arise, to the residuary legatee, are to be treated as but one legacy payable to different persons * * *. Such a construction cannot be adopted without doing violence to the language of the will. The gift of the income is independent of the gift of the principal; and the right to the income does not depend upon the investment, but was created and exists regardless of it. The direction to the executor, with respect to the investment of the fund, has reference to the administration of the trust, and cannot be available to defeat the legatee's title to income accruing previously to the time when the investment is required to be made.

" * * * If the estate is sufficient for the liquidation of debts and other charges, and is so invested as to be productive of income from the death of the testator, a bequest of income to a legatee for life must be construed to invest him with a title to such income from the date of the testator's demise, unless there is some provision in the will from which a contrary intent is to be inferred. The statutory time of payment of the income to the legatee is not affected by this construction. He must still wait, as the respondent did, until the expiration of one year from the grant of letters before payment of the income can be demanded, but he is then entitled to his share of the net income which has previously accrued."

See also:

In re Von Keller's Estate (1899) 59 N. Y. Supp. 1079, aff. 62 N. Y. Supp. 1150, 47 App. Div. 625;

In re Gurnee (1914) 147 N. Y. S. 396, 84 Misc. Rep. 324, aff. 150 N. Y. S. 1088, aff. 214 N. Y. 660, 108 N. E. 1095.

It is, of course, settled that the construction of a New York will by a New York Court is binding as to the meaning and effect of the will, and that the construction by the State Court determines not only legally, but practically, the extent and character of the interest taken by the legatees. See *Uterhart* v. *United States* (1916), 240 U. S. 598, 603, where it is stated:

> "It is very properly admitted by the Government that the New York decree is in this proceeding binding with respect to the meaning and effect of the will. The right to succeed to the property of the decedent depends upon and is regulated by state law (*Knowlton* v. *Moore*, 178 U. S. 41, 57), and it is obvious that a judicial construction of the will by a state court of competent jurisdiction determines not only legally but practically the extent and character of the interests taken by the legatees."

In *Disston* v. *McClain* (1906) 147 Fed. 114 (C. C. A. 3rd Cir., Certiorari denied, 207 U. S. 587), the Court stated at page 117:

> " • • • The natural meaning of such a provision, and of the language used, would seem clearly to be a series of legacies or bequests vesting in possession or enjoyment at stated intervals, but each, contingent, before vesting, on the legatee's being alive when it became due, the tax on which is not to be paid, as we shall see presently from the authoritative opinion of the Supreme Court in the Eidman Case, until and as it takes effect in possession or enjoyment."

See also:

Lynch v. *Union Trust Co.* (1908), 164 Fed. 161 (C. C. A. 9th Cir.), Certiorari denied (1909), 214 U. S. 523;

Westhus v. *Union Trust Co.* (1908), 164 Fed. 795 (C. C. A. 8th Cir.), Dismissed (1913), 228 U. S. 519;

U. S. v. *Fidelity Trust Co.* (1911), 222 U. S. 158;
McCoach v. *Pratt* (1913), 201 Fed. 1021 (C. C. A. 3rd Cir.) Aff. (1915) 236 U. S. 569;
Kahn v. *United States* (1921), 257 U. S. 244.

all of which cases, while involving Statutes not here concerned, recognize that amounts received by a beneficiary under a will out of the corpus of the estate are to such beneficiary gifts or bequests.

Numerous other cases might be cited, from the same and other jurisdictions. However, in our reading, no contrary authority has been found.

It may be here noted that the gift herein concerned does not include the right to possess the corpus even during life.

There is no difference in the essential characteristic that must determine the nature of the moneys derived from a bequest for years or for life as herein conceived, and any other bequest. Such bequests are gratuities, given by the owner to some one else, in no sense earned or accumulated by the recipient, not earned or accumulated by any capital to him belonging.

It is true that sums distributed to the beneficiaries of a trust estate are not infrequently spoken of as income in the sense that they flow from the capital fund; but what is income to one may be in every sense capital to another. Annual distributions to life beneficiaries are as truly gifts or bequests of capital to them as if given in a lump sum as specific legacies.

A man, living, may direct a mortgagee to pay the interest on the first of each month to his wife for twelve months. The interest is an income which has flowed from his capital and upon which he is doubtless taxable, but to the wife there can be no doubt that each payment is a

gift equally as if the husband on the first of each month himself handed her a check. Neither the fact that the mortgagee pays her instead of the husband, nor that the payments were in the first place income to the husband, nor that they continue over a period of time can alter the quality or nature of the gift to her. She has been given no title or right in the capital producing the interest or income; that capital remains the sole property of the husband, who has in effect severed the interest or income therefrom and given it to the wife.

A man by the creation of a trust may similarly sever principal and income and by the imposition of duties upon his representatives, his trustees, which will be enforced by a court of equity, may insure the payment of his gift of income even after his death. To follow our illustration, the trustees own and hold the mortgage or principal from which the interest or income is derived; each month they, instead of the husband, receive the interest and give it to the wife. Each payment is derived from exactly the same capital as in the husband's lifetime, and each payment is equally his gift to her, regardless of his death or the length of time during which the gifts or bequests may continue.

The effort of the Government to define the gift to the beneficiary as a mere "right to receive" and to treat the quarterly payments as "income" flowing from this intangible right, is the purest metaphysics. It in no way corresponds to the facts with which tax laws must deal.

Where the corpus of a trust estate consists, for instance, of one thousand shares of stock, the money which the beneficiary receives flows from that stock and not from his right to demand that the trustees carry out the testator's intention. This equitable right creates no gain. If the corporation whose shares are owned passes a dividend, no payment is made to the beneficiary and his "right to receive" will produce nothing in lieu thereof.

A man about to die may invest his whole fortune in coupon bonds of a maturity equal to his son's expectancy of life, and may direct his executor immediately upon his death to cut all the coupons and deliver them to his son, the bond itself to be held for his grandson. That gift or bequest consists of a certain number of coupons falling due on successive dates in the future. The coupons at once become capital to the son. He has received his bequest.

II.

The legacy received by respondent being property acquired by bequest, is expressly excepted from taxable income by Section II, B of the 1913 Act.

Section II, A (1) of the Act of 1913 (Act, October 3, 1913, chap. 16, 38 Stat. 114, 166) levies a tax upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, and to every person residing in the United States.

Section II, B (1) defines taxable income and is as follows:

> "That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from

> but not the value of *property acquired* by gift, bequest, devise, or descent."

The words "gift," "bequest," "devise," and "descent," as used in this statute, cover all *property* acquired by the owner gratuitously, and to that extent are synonymous. The owner in this case is Mr. Gavit, and the *property* acquired by him gratuitously under the will of Mr. Brady is the money actually paid to him. Without delivery to and possession by the legatee the gift to him is not complete. All that is ever delivered to and possessed by the legatee in this case is the money actually paid to him by the trustees. When so paid it is property acquired by bequest; for "acquire" means to get as one's own. He acquires the property itself by bequest, not as income on a bequest.

The contention is that the money paid Mr. Gavit is not *acquired* by bequest, but is *acquired by him* as income on a legacy. There is no authority cited to support this contention. The language of the statute is:

> " * * * the net income of a *taxable person* shall include gains, profits and income * * * including the income from but not the value of *property acquired by gift, bequest,* devise or descent."

This means just what it says; the taxable person is to be taxed on the income on property *he has acquired by bequest* and which is owned by him. The argument of the Government would necessarily require the application of the statute to two taxpayers instead of one, taxing one taxpayer on the income on a corpus that belonged to some one else. The statute contemplates property acquired by bequest in the hands of one taxpayer and income on that property, produced by it, coming in to the same individual, the owner. Where is the bequest acquired by Mr. Gavit and held by him producing the money

which the Government desires to tax? How is the money sought to be taxed acquired by Mr. Gavit if it is not acquired by bequest? The exception of the statute applies explicitly to this money so acquired; after he has acquired it, if it produces income, then to that income, produced by his legacy, the taxing statute applies. There is no qualification whatever to the statutory exception; no definition of bequest from which it could be argued that when a legacy is of income, or interest, it is not a property acquired by bequest. The exception in the statute was made for the purpose of disclaiming any attempts on the part of Congress to include property acquired by gift or bequest as taxable income, and to make certain, by taxing only the income on gifts and legacies, that the law would not be subject to the same attack made in *Pollock* v. *Farmers Loan & Trust Company,* 158 U. S. 601. The exception is absolute.

The Government entirely misconceives the purpose of the exception. The body of Section II B (1) (without the exception) clearly includes income on a gift or bequest; it includes *all* income. Certainly the exception was not inserted to again include such income. Exceptions are not embodied in statutes to give emphasis by repetition. The exception was inserted for the very purpose it specifies; namely, to except from taxable income something that would be embraced by the statute without the exception; namely, property acquired by gift or bequest. The provision that the income on such property shall be included is added as an additional safeguard to the disclaimer of any attempt to tax the gift or bequest itself.

Income on property acquired by bequest is, of course, taxable, but it must be income on such property and not the property itself. There is nothing in any of the income tax laws or in any of the decisions of this

Court construing the same which gives the slightest warrant for a construction that would draw a distinction between legacies and hold that when a person gives income which belongs to him to some one else that such a legacy is not acquired by the beneficiary by bequest, but is income on the legacy so acquired. There is nothing in any of said Acts or decisions which gives any authority for construing a bequest of income to a beneficiary for life not as a legacy, but as income on a legacy. The income tax is a tax on tangible property, on money received by the taxpayer during a certain period, on money that must come under the definition that has been settled by this Court, and under the very statute the Government invokes it must be income to the taxpayer, not property acquired by bequest.

III.

The legacy to the respondent consisted of the moneys to be paid to him from time to time under the terms of a will and not of a mere naked right to receive them.

The position of the Government, though not so expressly stated in its brief (pages 3, 16) logically is as stated in the following quotation from page 3 of its Petition for certiorari:

> "Petitioner contends that the actual legacy received by Gavit was the right to enjoy, under certain conditions, a portion of the income of the trust estate, a vested and valuable beneficial interest which no attempt was made to tax; but that the moneys paid to Gavit out of the income of the trust on account of said interest clearly constitute income derived from said legacy and as such were

> specifically taxable under the provisions of Section II-B of the Income Tax Act of 1913, *infra.*"

and the following from page 5:

> "What Gavit in fact took under Brady's will was a vested beneficial interest in the trust estate, enforceable in a court of equity, and which consisted of the right to receive, under certain conditions, a portion of the income of said trust estate. On this interest there was no tax because he received it as a bequest. On the other hand, what moneys Gavit received from the trustees of the estate were payments of income on the right which was the subject of the bequest."

We have referred above to this contention of the Government as metaphysical rather than legal. Whatever it possesses of plausibility is due solely to ideas based upon the procedure adopted in assessing and collecting, whether under State or Federal law, a succession or inheritance tax by way of excise upon the testator's death. Under such laws it becomes necessary in order to fix the amount of the excise to place a hypothetical value, with the aid of mortality tables, upon the legacies of the annuitant or life tenant. The value of his interest for purposes of such taxation is assumed to be the sum which it is estimated he would receive in cash if he lived out his expectancy. *Herold* v. *Kahn* (1908), 159 Fed. 608; *In re Stiles' Estate* (Sur.), 3 N. Y. Supp. 137; *In re Todd*, 12 N. Y. Supp. 642; *In re Grant's Estate*, 28 N. Y. Supp. 203.

Accordingly under the laws of the State of New York the present cash value of the bequest to the respondent Gavit was fixed at $2,732,972 and succession tax so paid on this basis. But it is certainly absurd to reason from this that all which Gavit receives from year to year during the duration of his legacy will be income, gain or profit arising from a vested beneficial interest valued at the foregoing figure.

What would be the contention of the Government if there were no constitutional objection to taxing property acquired by bequest, no statutory exception as to such property, no estate or excise tax, but simply an income tax on income actually received by the taxpayer, defined as including gains, profits and income derived from any source whatsoever? The Government contends that what Mr. Gavit actually received, his legacy, under the will was a vested and valuable beneficial interest. That vested interest was of the value of $2,732,972, fixed under the laws of New York. If the position of the Government is correct (there being no objection or exception) then certainly Mr. Gavit received a clear "gain" or "profit" during the year 1913 of $2,732,972, which would be subject to the income tax. In such situation would the Government contend that the tax would fall on said $2,732,-972 and not on the quarterly payments he received under the will?

The Government cannot expect to have it both ways. If what Gavit received as his legacy was "a vested and beneficial interest which no attempt was made to tax," possessing an estimated cash value under the mortality tables of $2,732,972, is it not clear that until at least that sum has been paid over to him he will receive nothing by way of income on his bequest, but merely the payment of his principal? Year by year portions of the capital value of his legacy will be received by him, but until the capital sum has been amortized by the payments so made, how can he be said to be in receipt also of taxable income to the same amount?

If the theory of the Government is correct and all that the beneficiary receives in cash is income to him, manifestly the manner in which the trust funds are invested can make no difference in the rule. The beneficiary's income, as the Government argues, is derived not

at all from the corpus of the estate but from his own naked right to receive. Yet, if the entire estate were composed of tax-exempt Government securities, would it be insisted that the interest thereon, non-taxable by law, loses this character at the moment of its delivery to the beneficiary? Would it not follow also that since the interest of the beneficiary is entirely extinguished by his death, an event the approach of which is inevitable, he should be entitled under the Government's theory to a yearly deduction to cover the diminishing value and depreciation of his "right to receive?"

In *Lynch, Executrix,* v. *Alworth-Stephens Company,* decided by this Court March 2, 1925 (No. 273, October Term, 1924), the Court in its opinion quotes the following from the opinion of the Circuit Court of Appeals:

> "And the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

If plain fact and ordinary meaning of ordinary words are departed from, and it is held that what is paid to a beneficiary for life is not a legacy, *but income on a legacy,* then the legacy itself is an intangible thing, a gift, never received by or in the possession of the beneficiary, and vanishing at his death. And, if it could be possible to thus create and use intangible property for the purpose of an income tax, the taxpayer certainly must be entitled to allowances for exhaustion and depletion.

The exigency in this case is said to arise from the fact that if the practical and reasonable construction is placed on this statute, large sums will escape the income tax. This is true and they will rightly escape from being taxed as income, because they are not income, because they are

in the same class as very much larger sums which no attempt is made to tax as income by the Government; namely, all property acquired by gift, bequest, devise or descent. Taxing laws are to be liberally construed in favor of the taxpayer, discriminations are to be avoided. To tax one legacy, one form of gift, and not another is discrimination. To say, however, that such legacies will escape taxation is contrary to fact. Legacies can be taxed, have been and are severely taxed, in the only constitutional and fair way; that is by an estate or excise tax.

The statute says that the value of property acquired by gift, bequest, devise or descent, shall not be income for the purpose of taxation. It must be conceded as a matter of fact and common sense that what Mr. Gavit acquired under the will of Mr. Brady was the money actually paid him by the trustees. Applying the statute as it reads, this is not taxable income to him.

In *Vanderbilt* v. *Eidman*, 196 U. S. 480, 495, former Chief Justice White quotes the following language from *In Re Hoffman*, 143 N. Y. 327:

> "We are obliged to follow one of two lines of construction. We must open all the nice and difficult questions which arise under a will as to the vesting of technical legal estates, although future and contingent, and assess the tax upon what are in reality only possibilities and chances, and so complicate the statute with the endless brood of difficult questions which gather about the construction of wills; or we must construe it in view of its aim and purpose and the object it seeks to accomplish, and so subordinate technical phrases to the facts of actual and practical ownership. For taxation is a hard fact, and should attach only to such ownership, and may properly be compelled to wait until chances and possibilities develop into the truth of an actual estate possessed, or to which

there exists an absolute right of future possession. I am not shutting my eyes to the statutory language, which is quite broad. The property taxed may be an estate 'for a term of years or for life or determinable upon any future or contingent estate,' or 'a remainder, reversion or other expectancy,' and the tables of mortality may be resorted to for the ascertainment of values. And yet, it is the 'fair market value,' the 'fair and clear market value,' which is to be assessed, and with the proviso that if that value cannot be at once ascertained, the appraisal is to be adjourned. I can scarcely imagine a contingency depending upon lives which mathematics could not solve by the doctrine of chances and the averages of mortality, and there could hardly be an adjournment unless upon some rare contingency having no averages, and the results in cases dependent upon lives might still leave the 'fair and clear market value' in doubt and yield sums which no sale in the market would produce."

The income tax is more tangible than a tax on the clear value; it is a tax on the actual money received during a fixed period by the owner thereof; and the money Mr. Gavit received was property acquired by bequest of Anthony N. Brady.

In the present case the Government contends that the legacy was a valuable vested interest and that the amount received by Gavit was income on such legacy to him. Suppose Mr. Gavit had died at the end of the first quarter of the first year. Would it not be certain that the value of the bequest made to him by the will of Mr. Brady was the amount paid to him by the trustees upon the first quarterly distribution? If it were taxable income that amount would have to be income on his legacy, yet at his death his legacy would have been received in its entirety. There would be nothing over for his estate, nothing remaining whatever of his gift; he would

have used it all. How could this be taxable income if property acquired by bequest is specifically excepted by the statute?

That what a beneficiary for years (such as is Mr. Gavit) receives is actually his legacy has been definitely decided by the Court of Appeals of New York, *In the Matter of Tracy*, 179 N. Y. 501, 510, in giving instructions as to the incidence and payment of the New York Transfer Tax on a life annuity, the Court stated (p. 510):

> "We will now consider the second provision of the decree, from which appeal is taken, in reference to the annuity of three hundred dollars for the benefit of James Rohm, payable semi-annually. Annuities are expressly referred to by Section 230, as already quoted. The manner in which this annuity is dealt with in the decree of the learned surrogate is unsupported by the statute. The probable duration of the annuitant's life should be ascertained in the manner pointed out by Section 230, which is under the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities, etc. This fact being ascertained, the amount of the transfer tax is computed thereon and becomes forthwith payable out of the fund set aside for creating the annuity. (In this case it happens to be the residuary estate.)
>
> The method of returning to the residuary estate the tax so paid by the trustees is as follows: Take for illustration an annuitant whose probable duration of life is ten years. The trustees would deduct from each annual payment as made one-tenth of the tax and restore it to the residuary estate."

This rule has been actually applied to Mr. Gavit; the entire tax as fixed by the tables was first paid out of

the capital fund, and each year there is taken out of the payments to Mr. Gavit 1/14th thereof (14 years being the period of his gift) and restored to the principal fund. Thus the tax is directly upon the legacy, taken out of the money Mr. Gavit acquired by bequest.

We contend, therefore, that it has been specifically determined by the laws of New York, as interpreted and applied by the highest court of New York, that the legacy to Mr. Gavit is the money actually paid to him, that that was the property transferred to him under Mr. Brady's will, what he acquired by bequest, and that therefore this question has been finally determined and that this determination is binding (*Uterhart* v. *United States,* 240 U. S., 598, 603).

We have cited other authorities which show that the gift of interest on a fund is a gift of the interest only; and that a gift, or bequest of income, is just as much a gift or bequest as is one of capital. But aside from these authorities, which we submit are controlling, we think it clear that the bequest to a beneficiary for years or for life, his legacy, is the property itself which he acquires solely by the bequest, not a mere abstraction. That as a matter of fact what the beneficiary gets under such a bequest is the money actually paid to him while he lives; that this money is in truth and fact his legacy, and that the tax would fall, if valid, directly upon it.

> "Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy." *Nicol* v. *Ames* (1899), 173 U. S. 509, 516.

We contend that as a practical matter, regarding substance and not form, the beneficiary for life receives, not income as defined in the 16th Amendment, but a legacy consisting of actual money, property acquired by bequest.

As stated in *Eisner* v. *Macomber* (1920), 252 U. S. 189, 211:

> "Having regard to the very truth of the matter, to substance and not to form, he has received nothing that answers the definition of income within the meaning of the 16th Amendment."

In *United States* v. *Fidelity Trust Company* (1911), 222 U. S. 158, which concerned the question of taxation of a life estate in a fund under an *excise tax*, Mr. Justice Holmes states the facts in part, as follows (p. 159):

> "The petitioner, appellee, was residuary legatee under a will, in trust to hold the fund 'either as at present invested or in such securities as to my said trustee may be deemed safe,' and to pay over the net income to the testator's niece 'in quarterly payments during all the period of her natural life.' On June 8, 1900, the appellee made a return to the collector of internal revenue, stating that the value of the residuary estate was $120,303.94, and that of a specific legacy of silverware etc. to the niece, $500. With the aid of mortuary tables, the rate of interest being assumed to be 4 per cent, the clear value of *the legacies to the niece* was fixed at $74,678.68, and an inheritance tax of $5,600.90 was assessed upon it, which was paid on August 16, 1900. Up to July 1, 1902, the date fixed by the statute, the petitioner had paid to the niece $17,027.59 income from the residue, and had delivered to her the specific legacy valued at $500. The tax on these sums at the rate of taxation was $1,314.59, which, deducted from the whole tax paid, leaves $4,286.31, to recover which this suit is brought." (Italics ours.)

Thus, in that case the Court regarded the payments of income to the life tenant *as the legacies* given to her by the will, the value of which, as ascertained by mortuary tables for purpose of the tax, which was upon a vested interest, was an entirely different thing from the money actually received.

The income tax, however, as we have heretofore pointed out, is the antithesis of a legacy tax. It is based entirely on actualities. The matter of the value of the property producing the income of an individual (except in case of conversion of capital assets) is of absolutely no consequence. Income to an individual identical in amount is identically taxed no matter what may be the value of the property producing it. An income of $10,000 arising from property valued at $1,000,000 would be taxed at the same rate as income of a similar amount produced from property valued at $1,000. The only case in which the value of a life estate would have any bearing upon the income tax of the beneficiary for life would be if it were possible to assign or anticipate his interest, in which event it would perhaps be proper to calculate the value of the estate by mortuary tables and tax as income to the beneficiary for life the increase of the sale price, if any, over the value as so fixed. There is no difference between this and the valuation of any other property which does not have an absolutely fixed monetary value when ascertaining the gain on conversion thereof for the purpose of taxation.

We maintain that taxation is a practical matter and that no practical man could be convinced that a bequest to him of the income on $120,303.94 for life was in fact a legacy to him of $74,678.68; which he might never receive, or receive only in installments; or that the money which he received which was earned by said $120,303.94, duly invested, was not earned by such fund but was

earned by the mythical $74,678.68; or that what was given him by the will was not income on $120,303.94, but was in fact $74,678.68, and that the moneys which he received came to him from such mythical fund (which would vanish at the moment he died) and not from the actual existing fund of $120,303.94. (Figures from last cited case, *United States* v. *Fidelity Trust Company*, 222 U. S. 158).

Quoting again from *United States* v. *Fidelity Trust Co.* (1911), 222 U. S. 158, 159-60, Mr. Justice Holmes states, speaking of a life estate in a fund:

> "The interest of the niece was not a contingent right to income as it should accrue in her lifetime, it was a vested life estate in a fund, changing in investment at the discretion of the trustee, but retaining its equitable identity * * *. When it (the statute) speaks of interests [illegible] vested in possession, we presume that it uses familiar legal expressions in their familiar legal sense. It deals in terms with the interest, that is, the legal unit of right, not *with the money received before a given moment.* No better example of such an interest could be given than a life estate in a fund, the enjoyment of which actually has begun * * *" (Italics ours).

This was said with reference to a succession tax. Such a tax is based not on the bequest, or inheritance; that is, not on property because of its ownership and possession, but on account of its passage by will or by descent in cases of intestacy. *Knowlton* v. *Moore*, 178 U. S. 41, 78.

This is the kind of tax which "deals in terms with the interest, that is, the legal unit of right, *not with the money received before a given moment.*" This is in fact the distinction between taxes of this character and an income tax; the income tax deals distinctly with "*the money re-*

ceived before a given moment"; namely, all money which can be classed as income which has been received by the taxpayer during the taxable year.

Surely there is a distinction in fact between a right or interest and the money or property obtained by virtue of the right or interest. The Government says "the actual legacy received by Gavit was * * * a vested and valuable interest," and that the income paid to him is the income on said legacy. The bequest, however, as made by the will to Mr. Gavit, was not of a vested and valuable interest in the fund, but was that he be paid by the trustees of a certain fund a certain part of certain rents, income and profits during a certain period. The actual legacy was the income; that was the property and the only property he acquired by his bequest. The law gives him a right to such income for a certain period and an enforceable interest thereto. If he should not choose to enforce that right or interest he would receive no money—and no contention could be made that he had received income. The will enforced by the law gives him the right to acquire his legacy, to realize his legacy, to get it as his *own*. The payments made to him are not income upon this right—this interest—but are the realization of his right and constitute in themselves the real substance of his legacy.

In case of intestacy the law gives to the heir title to a certain portion of the intestate's estate; that is, a right or interest which vests in him and can be enforced, but we do not believe anyone will contend that the property actually inherited by such heir is income on such right or interest, though it undoubtedly constitutes a clear gain to him. This is true as to every legatee.

IV.

Under the laws of the State of New York the respondent had neither ownership nor use of nor interest in the corpus of the testator's estate. His title was in the income and in that alone.

The Government takes issue with the Court below as to the relation between the beneficiary and the corpus of the estate, arguing that under the statute the ownership of the fund producing the income is immaterial in determining whether or not it is taxable income to the recipient. The Circuit Court of Appeals did not base its conclusion on this fact but found that the moneys received by the respondent were not taxable because they were acquired by bequest (*Irwin* v. *Gavit,* 295 Fed. 84). The ownership of the fund producing the income, however, is important in determining what is and what is not taxable income, and this is shown by the language of the statute itself.

Section II, A, Subdivision 1, of the Act of 1913 levies the tax upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, and Section II, B (1) of said Act provides:

> "That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transac-

> tion of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent:"

Clearly this section recognizes the fact that income to a person, arising out of capital, can only arise out of the ownership, or use of, or interest in real or personal property, and the distinctive character of an income tax is that it is a tax directly on a person solely because of his ownership of property; that is, his ownership of the income received from his property during a certain period. *Knowlton* v. *Moore,* 178 U. S. 41, 80, 81. 82.

The Government reverses the rule that a taxing statute must be strictly construed in favor of the taxpayer gives no effect to the provision that property acquired by bequest shall be expressly excepted, and does not recognize that which we think clearly appears from the statute and from the definition of income as adopted by this Court; that taxable income must be monies received by the taxpayer on account of the exercise of his own physical or mental faculties, or from property actually owned by him. Anything received otherwise can only be a gratuity and is exempted from being classed as income by the law itself.

The money paid to the beneficiary certainly does not arise out of his use or his interest in the corpus of the fund. He has no use of the corpus whatever; no dominion of any kind over it, such as has a life tenant in possession. Nor does his "interest" in the corpus, whatever that may be, produce income. The money he receives is produced by the corpus itself, not by his interest therein.

In New York the rights of the beneficiary in a trust estate are prescribed by statute. Section 100, *McKin-*

ney's Consolidated Laws of New York, Real Property Law, with reference to real estate, is as follows:

> "§ 100. TRUSTEE OF EXPRESS TRUST TO HAVE WHOLE ESTATE. Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust."

This section has been held to be applicable to personal property under Section 11 of the Personal Property Law. Section 103 of the Real Property Law is as follows:

> "§ 103. WHAT TRUST INTEREST MAY BE ALIENATED. 1. The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, can not be transferred by assignment or otherwise, but the right and interest of the beneficiary of any other trust in real property may be transferred.
>
> 2. The provisions of this section as here amended shall not impair or affect any rights existing on March twenty-fifth, nineteen hundred and three."

Section 11 of the Personal Property Law of New York (McKinney's Consolidated Laws of New York), reads:

> "§ 11. SUSPENSION OF OWNERSHIP. The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a last will and testament, for not more than two lives in being at the death of the testator. In other respects limitations of future or con-

> tingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property."

And Section 15 provides:

> "§ 15. PERSONAL PROPERTY NOT ALIENABLE IN CERTAIN CASES. 1. The right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, cannot be transferred by assignment or otherwise. But the right and interest of the beneficiary of any other trust in personal property may be transferred. * * *"

So that the only right or interest the beneficiary has in the trust estate is to enforce the performance of the trust, or to prevent interference with the trustee in the performance of his duties. He has no right or control over the corpus whatever, and only a personal action against the trustee to enforce the payment of income accrued and received by the trustee.

We think for the purpose of this case generally it is immaterial whether the beneficiary's remedy is *in personam* or *in rem*. The question here is as to the taxability of money which has actually been received by him by reason of a bequest, and of which he is the absolute owner. His right thereto can be enforced by a personal action against the trustee. This *right* which he gets under the will and the law is to obtain property which the testator gave to him.

This is a New York case and the New York law and decisions are controlling, and under that law and those decisions the beneficiary has only a right *in personam* and is the owner of no interest or estate in the trust property. (Statutes above cited, *Bogert on Trusts, 428.*) Thus, clearly until the money is actually paid to him by

the trustee he has received nothing whatever under the will. He cannot anticipate or assign in any way his right or interest.

The income tax, as we have stated before, is a tax based upon actual money received by the taxpayer within a certain period. If that money so received is acquired by bequest, then by the terms of the statute it is not taxable. If the money paid to Mr. Gavit was not the legacy bequeathed to him by the will of Anthony N. Brady, then he has never received that legacy. The Government confuses the right with the property. The right is an intangible thing; it is the power attached by the law to a will or deed by which the possession of the property given by the will or granted by the deed may be obtained. Under the law and the will of Anthony N. Brady a right was vested in Mr. Gavit to enforce the delivery to him of the legacy given him by the will; namely, his portion of the specified income.

The Government relies on the case of *Maguire* v. *Trefry*, 253 U. S. 12, a case involving the income tax law of the State of Massachusetts. Of course, the States in the matter of income taxes are not limited by the 16th Amendment to the Federal Constitution, nor by the definition adopted by this Court as to what is income under that Amendment. This case, however, is helpful in showing the distinction between the right to a bequest and the bequest itself. The case below was *Maguire* v. *Tax Commissioner*, 230 Mass. 503; also in *Scott's Cases on Trusts*, p. 743. Chief Justice Rugg, in his opinion, says:

> " * * * The *cestui que* trust has important legal rights respecting the trust fund which are personal to her. They are rights in the nature of property. They cannot be taken away from her by arbitrary or irrational procedure. They attach to her person wherever she goes. One of

these is the right to receive the income. That is a property right. *The income when received is property.* The tax here in question is a property tax. *Tax Commissioner* v. *Putnam,* 227 Mass. 522, 531, 532.

* * * * * * *

"The income tax is measured by reference to the riches of the person taxed *actually made available to him for* valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden.

* * * * * * *

"It is true of the present tax, as was said by Chief Justice Shaw in *Bates* v. *Boston,* 5 Cu... 93 at page 99, 'The assessment does not touch the fund, or control it; nor does it interfere with the trustee in the exercise of his proper duties; nor call him, nor hold him, to any accountability. It *affects only the income, after it has been paid to the trustee' to the beneficiary.*"

We also think that the opinion of Mr. Justice Day, in deciding the same case in this Court, makes the same distinction. *Maguire* v. *Trefry,* 253 U. S. 12, 16:

"It is this property right belonging to the beneficiary, *realized in the shape of income,* which is the subject matter of the tax under the statute of Massachusetts."

The property right in this case is the right to receive the legacy under the bequest of Mr. Brady, and that legacy, when realized—that is, got into actual possession by the beneficiary—in the shape of income, is property acquired by bequest.

The fact that a bequest of income for years or life is just what it purports to be—a gift of the income actually received by the beneficiary—is also illustrated by the cases in which the testator directs that the income shall be paid to the beneficiaries free from claims of creditors.

An illustrative case is *Broadway National Bank* v. *Adams,* 133 Mass. 170; Ames' Cases on Trusts, 2nd Edition, 397; Scott's Cases on Trust, 604. The Court states:

> "The question wheth · the founder of a trust can secure the income of it to the object of his bounty, by providing that it shall not be alienable by him or be subject to be taken by his creditors, has not been directly adjudicated in this Commonwealth. The tendency of our decisions, however, has been in favor of such a power in the founder. *Braman* v. *Stiles,* 2 Pick. 460. *Perkins* v. *Hays,* 3 Gray, 405. *Russell* v. *Grinnell,* 105 Mass. 425. *Hall* v. *Williams,* 120 Mass. 344. *Sparhawk* v. *Cloon,* 125 Mass. 263.
>
> "It is true that the rule of the common law is, that a man cannot attach to a grant or transfer of property, otherwise absolute, the condition that it shall not be alienated; such condition being repugnant to the nature of the estate granted. Co. Lit. 223a. *Blackstone Bank* v. *Davis,* 21 Pick. 42.
>
> "Lord Coke gives as the reason of the rule, that 'it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien,' and that this is 'against the height and puritie of a fee simple.' By such a condition, the grantor undertakes to deprive the property in the hands of the grantee of one of its legal incidents and attributes, namely, its alienability, which is deemed to be against public policy. But the reasons of the rule do not apply in the case of a transfer of property in trust. By the creation of a trust like the one before us, the trust property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation; *the cestui que trust takes the whole legal title to the accrued income at the moment it is paid over to him.* Neither the principal nor the income is at any time inalienable."
>
> * * * * * * *

"The precise point involved in the case at bar has not been adjudicated in this Commonwealth; but the decisions of this court which we have before cited recognize the principle, that, if the intention of the founder of a trust, like the one before us, is to give to the equitable life tenant a qualified and limited, and not an absolute, estate in the income, such life tenant cannot alienate it by anticipation, and his creditors cannot reach it at law or in equity. It seems to us that this principle extends to and covers the case at bar. The founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift which such restrictions or limitations, not repugnant to law, as he saw fit to impose. His clear intention, as shown in his will, was not to give his brother an absolute right to the income which might hereafter accrue upon the trust fund, with the power of alienating it in advance, but only the right to receive semi-annually the income of the fund, *which upon its payment to him, and not before, was to become his absolute property.* His intentions ought to be carried out, unless they are against public policy."

When slaves were property in this country cases arose as to whether the increase of slaves granted to a person for life and then to another belonged to the life tenant or the remainder man. The question was largely decided in accordance with the terms of the will, the general rule based on humanity being that in the absence of some explicit provision in the will the children followed the mother and went to the remainder man, though the opposite result could be brought about if expressly provided for in the will. *21 Corpus Juris,* p. 1042; Section 6 and cases there cited. Assume that a will expressly provided that a female slave was to go to A for life, at the death of A to be free; and that the increase of said slave, during the life of A, should go to B abso-

lutely; could it be worked out on any hypothesis that a slave child coming to B under such a bequest was not the legacy itself?

The legacy is what the beneficiary actually received by virtue of the bequest. A bequest, like a gift, to be complete, requires delivery. What the life tenant or tenant for years gets is what the testator bequeathed him, whether it be capital or income. Of course, if capital and income go to the same person the estates are merged and the income from that time on is necessarily income to the owner of the capital.

In the present case the Government contends that what the recipient receives is income on a legacy; that he has a vested and valuable interest in the corpus.

In *Baltzell* v. *Mitchell,* 1 Fed. (2nd) 29, affirmed by the Circuit Court of Appeals, First Circuit, 3 Fed. (2d) 428, the beneficiary for life was required during the taxable year 1919 to pay a large income tax on moneys actually paid to her by trustees. She claimed a deduction on account of the fact that during that year the trustees sold securities at such a loss that there was in fact no net income to the trust estate. The claim was denied by the lower Court.

In the Court of Appeals the Government in its brief (pp. 17, 18) took the following position:

> " * * * In the present cases, the plaintiffs and the trusts are separate and distinct. The plaintiffs occupy no relation to the business carried on by the trusts, nor do they have any management or control over the corpus of the trusts. They receive periodically net amounts of income distributed after the expenses of administering the trusts have been paid. The plaintiffs have no right to securities held by the trusts, but only the right to receive their distributive shares of the

> income thereof pursuant to the instrument and order creating the trusts. The transactions out of which the alleged losses occurred, were carried on by the trusts and were not entered into by the plaintiffs or on their behalf for a profit, as the beneficiaries could not have availed themselves of any such profits, had profits resulted. If there had been a gain instead of a loss by reason of the sale of the capital assets, such gain would have become a part of the corpus of the trusts and would not have been distributed to the beneficiaries as income."

This contention was sustained by the Court of Appeals, the Court stating in its opinion (p. 430):

> "The beneficiary clearly has no distributive share in the net income of the estate or trust; but he has a distributive share of income to be paid him under and in accordance with the terms of the trust, and resort must be had to them to ascertain his proportion of the income or his distributive share. The beneficiary is not interested in the capital of the trust, but only in the income. If there are any accretions to the capital these are not distributable as income, so that the beneficiary may receive any part of them; and if there are capital losses they cannot be made good out of the income. The capital may be depleted by such losses; but the income for that taxable year is not. It may in future years be diminished because of the diminution of the capital."

It seems to us that the argument of the Government and the opinion of the Court necessarily demonstrate the propositions we are here contending for; that as a matter of fact, under the income tax Act the beneficiary has no tangible interest whatever in the corpus of the estate; that what he gets is a legacy given him by the will, which is the income, if any, segregated entirely from the corpus and only becoming his property when

he receives it. In other words, if he received a valuable, tangible property in the corpus, a legacy which produced his income, then the decision in the *Baltzell* case would undoubtedly be wrong and the beneficiary would be entitled to the deduction.

It is to be noted that in the *Baltzell* case the question which is presented in the case at bar was not raised and no claim was made that the money received by the beneficiary was not taxable because it was property acquired by bequest, and that question was not touched upon in the decision.

V.

That the income is collected by the trustee is immaterial.

The legal title to property given in trust is, of course, in the trustee. Thus, it may be argued as the trustee of a fund, the income from which is to be paid to another, is in law the owner of the fund, the income thereon is income to him as he is a taxable person. Without expressing ourselves as to the situation arising where the capital fund and the income thereon go to one person, constitute one gift, it is clear that the case we are in fact considering consists of two gifts of two different things and to different persons; a gift of capital to one person and a gift of the income on such capital to another. *Gibbons* v. *Mahon*, 136 U. S. 549; *In the Matter of Stanfield*, 135 N. Y. 292. The income tax is a direct tax on property which falls on the person to whom the property actually belongs when it is taxed. In this case there are two gifts; one of the capital to one person, the other of the income to another person.

As illustrated by *Field* v. *Hitchcock* (1835), 34 Mass. (17 Pick) 182, the legacy to the life tenant is a gift of the interest on the fund only, and it is the duty of the trustee to pay the interest only to the person entitled thereto for life and to preserve the principal for him who is entitled to take it afterwards. The trustee is the legal owner of the capital fund so long as the life estate is outstanding. He is also, for the purpose of collecting the same and paying it over to the beneficiary for life, the legal owner of the income. He is, however, only the legal owner. Neither the capital fund nor the income belongs to him. As stated by Justice Shiras in *Welles* v. *Larrabee* (1888), 36 Fed. 866, 870.

> "The word 'trustee' is one of significance. It is constantly made use of, not only in legal phraseology, but in common speech, to indicate that one holds the title to property, not in his own absolute right, but for the benefit of some other party or parties."

and by Mr. Justice Day in *Maguire* v. *Trefry,* 253 U. S. 12-16:

> "It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title and interest distinct from its legal ownership. 'The legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly, or in part, to others' (2 Story's Equity 11th ed. 964). It is this property right belonging to the beneficiary, realized in the shape of income, which is the subject-matter of the tax under the statute of Massachusetts."

We think the case of *Lederer* v. *Stockton* (1922), 260 U. S. 3, is directly applicable in principle. That case dealt with the exception granted on income received by

a corporation operated for charitable uses and purposes. There was a bequest of a residuary estate to the hospital, and it was necessary that the bequest remain in control of trustees appointed by the will until the termination of certain annuities. An arrangement was made by which the residuary fund was in fact placed in possession of the hospital and it paid a sum sufficient to cover the administration charges and remaining annuity, retaining the balance of the income for its own use; but, nevertheless the fund, the income of which went to the hospital, was constructively in the hands of the trustee. The Government maintained that the income on the property, while it was subject to the trust, was taxable and the exception did not apply. The Court overruled this contention and dealt with the matter as one of fact and estated (p. 8):

> "To allow the technical formality of the trust, which does not prevent the hospital from really enjoying the income, would be to defeat the beneficent purpose of Congress."

The income tax falls upon the person to whom the income belongs as a matter of fact. Assume that A collects interest on money to the amount of $10,000 and gives it to B in trust to deliver to C at the end of a certain period. Is that income and not a gift to C simply because it passed through the hands of B? What is the difference if A, owning the fund that produces the interest, empowers B to collect the interest in trust to deliver to C? It is the same interest and the same gift; so with the testamentary trust. The income collected by the trustee either is a gift or it is not. The temporary possession of the trustee cannot alter the character of the property.

A trustee of a fund, charged with the duty of paying the income thereon to another, often in changing the in-

vestments makes a substantial capital gain. This is a gain accruing to the gift proper, the fund itself; constitutes no part of the gift and is properly taxable as income under the definition. *Merchants Loan & Trust Co.* v. *Smietanka* (1921), 255 U. S. 509. It will be noted that in this case, in the opinion of the Court it is stated (p. 517):

> "Thus, it is the plainly expressed purpose of the Act of Congress to treat such a trustee as we have here as a 'taxable person' and *for the purposes of the Act to deal with the income received for others precisely as if the beneficiaries had received it in person.*"

The statute is fully valid as applied to income received by a trustee, when the income so received is taxable income under the definition. If it is not taxable income if received by the beneficiary, it would be a contradiction both in fact and law to say that it loses its exceptional character while it is in the hands of an intermediary.

Assume a trust fund of $100,000, the income to the extent of $4,000 per year, by specification of the will, to be paid to the beneficiary for ten years, then the fund to go absolutely to another. Assume that the annual income on the fund is $6,000. $2,000 would undoubtedly be taxable income to the trustee, for it represents income on the gift which goes to the remainderman. It belongs to, goes to the fund of which the trustee is the legal owner. The $4,000, however, is not taxable, for it is a gift to the beneficiary and any tax assessed against it would be directly a tax on his gift; the fact that the check for the tax was issued by the trustee would in no degree lessen the directness of the burden upon the beneficiary.

Assume again that the bequest by special direction

of the will is of the income of a fund of $100,000, to the full extent of $6,000 per year for ten years, with direction to the trustee to make up any deficiency in such income from the capital. Assume that the fund only produces $4,000 a year, so that the trustee has to take $2,000 from the capital to fill out the gift. There would be no income whatever to the trustee; a capital expenditure instead. The gift to the beneficiary would be in fact part of the trust fund, part income thereon; to him, however, it would make no difference as to the source as it is a gift; to him there would be no difference between the $4,000 and the $2,000. The Government, we assume, would admit that the $2,000 is not income to anyone, yet so far as the beneficiary is concerned the $2,000 is just as much income to him as is the $4,000. The law speaks of income to the ultimate taxpayer; he who cannot shift the burden, on whose property the tax falls because he owns it.

VI.

To construe the Income Tax Law as applying to a legacy would make it to that extent unconstitutional.

It has been definitely settled that, under the Constitution, full power is given to the Government to tax everything except exports (we have in mind certain exceptions such as State governments and their instrumentalities, salaries of Federal Judges, etc., but such exceptions have no influence upon the broad power of which we are speaking), but this power can only be exercised in certain ways. Direct taxes must be apportioned, excise taxes must be uniform.

Pollock v. *Farmers Loan & Trust Co.* (Rehearing) (1895), 158 U. S. 601, 637, determined that a tax on the

earnings of invested capital was a direct tax and void, not being apportioned; it is there stated:

> "Our conclusions may, therefore, be summed up as follows:
>
> First. We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.
>
> Second. We are of opinion that taxes on personal property, *or on the income of personal* property, are likewise direct taxes * * *" (Italics ours).

Then the 16th Amendment was passed to obviate the effect of the *Pollock* case.

This Amendment did not extend the taxing power of Congress to new fields; it did not create a new power; it simply *authorized* a direct tax without apportionment on incomes (as that word was understood at the time of the adoption of the Amendment) "from whatever source (such income is) derived." *Brushaber* v. *Union Pacific Railroad Company* (1916), 240 U. S. 1; *Peck & Company* v. *Lowe* (1918), 247 U. S. 165.

The income tax act undoubtedly levies a direct tax. The word "direct" in the Constitution is used in its "natural and obvious sense." *Pollock* v. *Farmers Loan & Trust Company* (1895), 158 U. S. 601, 619. The tax is directly on the income itself, on the taxpayer on account of his ownership of the income; not on income belonging to some one else. *Flint* v. *Stone Tracy Company* (1911), 220 U. S. 107; *Eisner* v. *Macomber* (1920), 252 U. S. 189; and, in the case of a tenant for years or life tenant there is no possibility of shifting the burden. *Pollock* v. *Farmers Loan & Trust Company* (1895), 158 U. S. 601; *Knowlton* v. *Moore* (1900), 178 U. S. 41, 82.

On its face this tax has no resemblance to an excise tax or duty, and no claim is made that if the bequests in question are not properly directly taxes as income they are taxed at all.

> "A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.
>
> "In order, therefore, that the clauses cited from Article 1 of the Constitution may may have proper force and effect, save only as modified by the Amendment, and that the latter also may have proper effect, *it becomes essential to distinguish between what is and what is not 'income,' as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form.* Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised." (*Eisner* v. *Macomber* (1920), 252 U. S. 189, 206).

The precise question then is, are such bequests 'income," as that word is used in the 16th Amendment? As so used the word has been defined by this Court. Thus, any property which does not fairly come within that definition, which is not in fact income as so defined, cannot be directly taxed and is not embraced in the law, even though Congress may specifically include it.

Our contention is that the property in question is in

no sense income to the recipient, but is a bequest, a pure gratuity; that any construction that gives this income tax law the effect of taxing such a bequest would make the Act to that extent unconstitutional.

We do not contend that the Act of 1913 is unconstitutional; far from it. But we do contend that if it has the effect the Government claims, and discloses a plain intent by Congress to tax as income property which is not taxable income under the definition adopted by this Court, the Act to that extent is a nullity. We submit that the Act cannot be so construed; on the contrary, that property gratuitously acquired has never been considered as income.

Property acquired by bequest had never at the time of the passage of the 1913 Act been regarded by Congress or the Treasury as income and subject to a direct tax.

This subject is so fully covered in *Pollock* v. *Farmers Loan & Trust Company* (1895), 157 U. S. 429, and *Knowlton* v. *Moore* (1900), 178 U. S. 41, that it needs no elaboration. Unless the present Acts can be considered as attempting to tax bequests, legacies, or inheritances directly, it may be said that Congress has never regarded such property as subject to a direct tax, but as property that could only be reached indirectly by an excise, legacy or succession tax, which is the antithesis of a direct tax. *New York Trust Company* v. *Eisner* (1921), 256 U. S. 345.

There is one exception to this statement which demonstrates that bequests, legacies, are not taxable as income. The Act of 1894, which was condemned in *Pollock* v. *Farmers Loan & Trust Company*, purported to tax "gains, profits and income."

Chief Justice White, in his opinion in *Knowlton* v. *Moore* (1900), 178 U. S. 41, 52), says:

> "In the statute of August 27, 1894 (28 Stat. at L. 509, C. 349), what was in effect a legacy tax was imposed by the provisions of Section 28. Ib. 553. The tax was *eo nomine* an income tax, but was in one respect the legal equivalent of a legacy tax, since among the items going to make up the annual income which was taxed was 'money and the value of all personal property acquired by gift or inheritance.' This law was not enforced."

It is obvious that such a tax, levied directly on the legacy, would be void, in view of the Court. That was the very question in *Knowlton* v. *Moore* (1900, 178 U. S. 41, where it was argued that the tax, imposed by virtue of the Act of June 13, 1898, was directly upon the bequest, and, not apportioned, was therefore void.

The opinion of the Chief Justice practically admits that, if direct, the tax would be void, but found it to be an excise, a legacy tax, hence not direct within the meaning of the Constitution and subject only to the test of uniformity. That case is and must be authority for the proposition that a bequest of income on a fund for life is a legacy, a bequest. It, with the *Pollock* case and *Eisner* v. *Macomber*, must also be authority for the proposition that such bequests constitute a class of property that cannot be directly taxed, without apportionment, as not being income within the meaning of the 16th Amendment. Further, that such bequests, legacies, or gifts can only be reached by an excise, a succession or legacy tax.

So far as we are aware, it has never been contended that the 16th Amendment had the effect of changing a direct to an indirect tax; that is, that a tax levied directly on a legacy, invalid as a direct tax before the Amendment, became an indirect tax and valid after the Amendment. On the contrary, it has been repeatedly argued to

this Court that various Acts passed since the 16th Amendment which in effect taxed legacies or bequests, commonly called legacy taxes, were invalid as being direct taxes, and this Court has invariably sustained said Acts on the sole ground that they were not direct taxes, but were in the nature of an excise or duty.

In *Griener* v. *Lewellyn* (1922), 258 U. S. 384, 386, it is stated:

> "That the Federal government has power to tax the transmission of legacies was settled by *Knowlton* v. *Moore,* 178 U. S. 41; and that it has the power to tax the transfer of the net assets of a decedent's estate was settled by *New York Trust Co.* v. *Eisner,* 256 U. S. 345. The latter case has established also that the estate tax imposed by the Act of 1916, like the earlier legacy or succession tax, is a duty or excise, and not a direct tax like that on income from municipal bonds. *Pollock* v. *Farmers' Loan & Trust Co., supra.* A state may impose a legacy tax on a bequest to the United States, *United States* v. *Perkins,* 163 U. S. 625, or on a bequest which consists wholly of United States bonds, *Plummer* v. *Coler,* 178 U. S. 115; *Orr* v. *Gilman,* 183 U. S. 278. Likewise the Federal government may impose a succession tax upon a bequest to a municipal corporation of a State. *Snyder* v. *Bettman,* 190 U. S. 249, or may, in determining the amount for which the estate tax is assessable, under the Act of 1916, include sums required to be paid to a State as inheritance tax, for the estate tax is the antithesis of a direct tax, *New York Trust Co.* v. *Eisner, supra.*"

As Mr. Justice Holmes states in *New York Trust Company* v. *Eisner* (1921), 256 U. S. 345, 349:

> "Upon this point a page of history is worth a volume of logic."

Is not the assumption justified that if the power existed in Congress, as it does in the States, to levy a tax directly upon legacies, and bequests, that power would have been exercised instead of the indirect method which has been followed from the beginning? And that if the 16th Amendment granted the power to include gifts and bequests as taxable income that power would have been clearly exercised by Congress?

The 16th Amendment means the same now as it did when adopted; at that time bequests such as are here considered were regarded as bequests or legacies to the beneficiary (see cases cited in Subdivision I of this brief) and were not thought of as income; therefore, such bequests cannot now be regarded as intended to be covered by the Amendment. *Merchants' Loan & Trust Company* v. *Smietanka* (1921), 255 U. S. 509, 519.

The Act of 1867 provided for a tax on

> "gains, profits and income whether derived from any kind of property, rents, interest, dividends or salaries * * * or from any source whatever."

The Commissioner of Internal Revenue ruled upon this provision (7 Internal Revenue Record 59; Washington, February 18, 1868):

> "Gifts of money, when clearly not in the nature of payment for services rendered, or other valuable consideration, are not liable to taxation as income."

An earlier decision by the same official states:

> "Legatees are not required to return their legacies as income. There is a specific tax on legacies of personal property in Section III" (Boutwell, Direct and Excise Tax System of the United States; 1863, page 275).

In *Turner* v. *Cuxon,* L. R. 22 Q. B. D. 150 (1888) Lord Chief Justice Coleridge reached the same conclusion with respect to gifts under the British Income Tax Acts of 1842 and 1853, which levied a tax upon the "annual profit or gain arising from any kind of property" or "from any profession, trade, employment, or vocation." In that case it appeared that Cuxon had received a sum of money from the Curates' Augmentation Fund in recognition of his deserving record as a curate. After stating the facts, the Lord Chief Justice said:

> "Now is this sum in the hands of the curate assessable to the income tax? It is, if it is an 'annual profit or gain arising from any kind of property' or 'from any profession, trade, employment or vocation'; but it clearly does not so arise; it comes at the mere will of this charitable society."

The 1913 income tax act is not an excise; it is a direct tax and a direct tax on only one subject matter, incomes. Congress could not, if it attempted to do so (and we submit it has not so attempted in this Act) by mere words change the essential characteristics of taxable property. Thus, it can not, without apportionment, directly tax capital under the guise of an excise.

> "Undoubtedly, in the course of the opinion in the *Pollock case,* it was said that, if a tax was direct within the constitutional sense, the mere erroneous qualification of it as an excise or duty would not take it out of the constitutional requirement as to apportionment. But this language related to the subject-matter under consideration, and was but a statement that a tax which was in itself direct, because imposed upon property solely by reason of its ownership, could not be changed by affixing to it the qualification of excise or duty. Here we are asked to decide that a tax is a direct tax on property which has at all times been con-

> sidered as the antithesis of such a tax; that is, has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy." (*Knowlton* v. *Moore* (1900), 178 U. S. 41, 81.)

That this, in fact, is still the understanding of the Treasury appears from *Article 73, Treasury Regulations 45* (1918 Act), which reads:

> "Money or real or personal property received as gifts, or received under a will or under statutes of descent and distribution, are exempt from tax, although the income therefrom derived from investment, sale or otherwise is not."

It accordingly appears that prior to the proposal of the Sixteenth Amendment, the Treasury Department, the English courts, the Supreme Court of the United States, and Congress itself had all recognized that gifts are not generically income. The word "income" having been thus universally construed prior to 1913 as excluding property acquired by gift, bequest, devise, or descent, it follows that the people in enacting the Sixteenth Amendment and Congress in enacting the 1913 Act must have adopted the same construction. This is an elementary rule of interpretation (*U. S.* v. *Cerecedo Hermanos y Compania,* 209 U. S. 337; *N. Y., etc., Rd. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361; *Robertson* v. *Downing,* 127 U. S. 607).

Such property is not covered by the definition of taxable income under the 16th Amendment.

The Government relies wholly upon the definition of income given in Section II, B. (1), of the 1913 Act. That section (disregarding the express exception) construed as the Government construes it would, of course, include everything any one could possibly receive, but what is

income taxable under the 16th Amendment has been defined by this Court, and anything that does not come within that definition is not taxable, even though it may be covered by the broad language of the statute.

The definition of taxable income as given in *Eisner* v. *Macomber* (1920), 252 U. S. 189, 207, is:

> "After examining dictionaries in common use (Bouv. L. D.; Standard Dict.; Webster's Internat. Dict.; Century Dict.), we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 (*Stratton's Independence* v. *Howbert,* 231 U. S. 399, 415; *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, 185)—'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle Case (pp. 183, 185).
>
> "Brief as it is, it indicates the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy. The Government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word 'gain', which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. *'Derived—from—capital'; —'the gain—derived—from—capital,' etc.* Here we have the essential matter: *not* a gain accruing to capital, not a growth or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed* from the capital however invested or employed, and coming *in,* being *'derived'*, that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. Nothing else answers the description."

The property now sought to be reached by the Government under this definition is money derived by the recipient not as a gain from capital, but as a gift under a will. So far as the recipient is concerned (and he is the only one in fact concerned, as he is the "taxpayer"), the money might as well drop into his hand from the sky. It is accumulated from no capital of his, is due to no labor or expenditure of energy, physical or mental, by him. It is produced by no fund under his dominion or control. It is a pure gratuity; a gift of personal property made by will.

The fact that the money finally paid to him as a gift represents a gain, or income, on capital belonging to some one else, does not make it income to the recipient. If A makes $10,000 and gives it to B, it is income to A but not to B. To hold that income, or gain, received by one person as the fruit of his capital or labor is income to another person when gratuitously transferred to him would automatically place all gifts and bequests in the category of income and call for a revision of the settled definition of the word. A bequest of income can not possibly be held to be a gain *derived by the beneficiary*, the taxpayer, from capital. To be income to the taxpayer it must be *derived* from capital or labor by him; that is, earned for him by *his* capital, or by capital under his dominion or control, or *his* labor. Here it is, in fact, to the taxpayer, a bequest of capital. *United States* v. *Merriam* (1923), 263 U. S. 179.

Senator Cummins, in the course of his debate on the 1913 Act, said:

> "I do not think there is any man in America who would contend or could contend that a gift or devise or bequest of property or property coming to one by descent is income. I never heard of it being so construed, and it is not possible that it could be so construed." (Congressional Record, 63d Congress, 1st Session, Vol. 50, page 3488.)

It is conceded, we believe, that a bequest made by a will is not taxable as income. This must be conceded on the authority of *United States* v. *Merriam*. It must also be conceded as a matter of fact, and of law from the authorities cited, that a gift of income for years or for life, made by a will, is a bequest. Now what is there in law or logic to separate bequests so as to except the more valuable bequest from taxation and tax the lesser? It is conceded that a bequest of $100,000 to A, payable in annual installments of $10,000 per year, is not income and not taxable; yet, it is contended that if a fund is set aside by the same will, which will produce an annual interest of $10,000 and that interest is bequeathed to B so long as he shall live, the principal to go to someone else, such bequest is income to B and taxable as such. B obtains his property in exactly the same manner as A. He does not earn it and it is produced by no capital of his, nor under his control. It is just as much a bequest, just as completely a gift, as is the bequest to A. True the money is earned by capital, but that capital does not belong to the legatee. The installments bequeathed to A may likewise be earned by capital not belonging to A. All property has to be either earned or inherited sometime by someone; as inherited it is not income, as earned it is. What the beneficiary for life receives as his bequest is money, and on that money the tax is sought to be imposed. The actual amount of cash received by the beneficiary each year is taxed, and that cash is his bequest.

There is no question here of taxing the value of the life estate; this is not an excise or legacy tax; it is directly on the money actually received as it is received, and that money is a pure bequest to the beneficiary.

The money so bequeathed and received in no sense comes under the definition adopted by this Court as covering everything which Congress, under the 16th Amendment, is authorized to tax.

VII.

The construction sought by the Government would make the Act arbitrarily discriminatory. Such construction is to be avoided, if possible.

The Government insists that income received by a beneficiary for years or for life under the bequest of a will is taxable income to such beneficiary. Necessarily there is no difference on this question between bequest of income for life and one for years, assuming that in both cases the corpus of the estate goes to some one other than the beneficiary. The real basis for this contention is that the money which the beneficiary receives —be he one for life or for years—is in fact income on a fund and is therefore income to the recipient. This reasoning is falsified by the fact that income has been defined and under that definition a bequest is not income to the beneficiary. The Government would certainly admit that a bequest of $100,000 outright to a person is not taxable as it is not income. There is no more magic in the word "income" than there is in the words "gains" and "profits." *Gould* v. *Gould* (1917), 245 U. S. 151. We have referred before to the fact that there is nothing in the Constitution, the law or the decisions of this Court which warrants any subdivision of gifts into taxable and nontaxable classes, but to sustain the Government's contention in this case such classification must be made. A beneficiary for life or for years in the income of a fund created by will receives the money which is paid to him annually in just one way; from the bounty of the testator as made effective by his will. It is just as much a bequest, a legacy, as any other gift that a testator can make.

Assume that a testator gives $100,000 to A with instructions to his executors that such bequest is to be paid

in ten annual installments of $10,000 each, and in the same will he creates a fund to produce an annual income of $10,000, giving the income on such fund to B for ten years, and upon B's death the fund to go to some one else, then the claim is that A's bequest is not taxable because it is a bequest, while that to B is taxable because it is income to B.

To make it a little plainer, assume that the testator gives to A outright $10,000, and creates a trust fund that will bring in an income of $10,000 a year, giving the income on such fund to B for the first year, C for the second, D for the third, and so on, the fund itself to go to some one else. It is contended that the gift of $10,000 to A is not taxable because it is a bequest, while the respective payments which will be made to the other beneficiaries are all taxable as they are not bequests but income. This on its face is contrary to fact. There is no difference whatever among the recipients as to the manner in which they receive their property. None of them get it as income. All of them receive it purely as legacies, or gifts.

Assume again a bequest of $500,000 to A outright and a less valuable bequest, one of the income of $500,000, to B for life. The contention is that the greater bequest goes tax free, but that the lesser, the bequest to B for life, he must pay a tax on every cent that he receives. But it is argued this is fair, because while the bequest of $500,000 to A is not taxable, still the income on it is. This argument only illustrates the unfairness. A can do as he pleases with his $500,000. He pays no taxes whatever on it, and will pay no taxes at all unless he puts the fund to work so as to create taxable income. He may invest it in tax-exempt securities. He may allow it to lie idle in bank. He may waste it. In none of these cases will he pay any income

tax. It is clear that the only taxes he will have to pay in any event will be taxes on the income of the gift and not on the gift itself. But with B the case is different. He will first be taxed on what he receives under the will, on the gift itself. In addition, after he has received his gift as depleted by the tax exacted from it he will also have to pay additional income tax on whatever income this gift produces. Thus, by the same will, two persons who receive property in absolutely the same way—that is, as legacies—will be in two entirely different classes; in one class all legacies will be taxed; in the other they will be free from taxation. So construed the present income tax laws would be grossly discriminatory against beneficiaries for life and beneficiaries for years, the discrimination being wholly without basis.

Probably the most frequent form of bequest, aside from the direct bequest, is what is commonly known as a life estate in a fund. The absolute bequest which becomes the property of the beneficiary immediately is generally made to a beneficiary who is fully able and competent to take care of himself and the property bequeathed to him. A life estate, speaking generally, is usually created for the benefit of widows, minors and persons under some disability, physical or mental, for whom protection and provision is essential and for whom it has been demonstrated the safest provision is one which makes the gift available in installments sufficient to support the beneficiary so long as he or she shall live.

If any favoritism were warranted at all in classification, which as between these two classes would make the property given to one subject to depletion by tax and the other exempt from such depletion, undoubtedly the first should be subject to the tax and the second exempt. The construction sought to be placed upon the law by

the Government is directly opposite to this. The dependent takes her gift subject to an inescapable tax. The independent is absolutely exempt.

Assume the case of a testator having two children and a net estate of $1,000,000, which he desires to divide equally between them. One child is a son of mature years, in possession of all his faculties and self-supporting. To him the testator bequeaths $500,000 outright. The other child is an invalid daughter, with an uncertain expectancy of life, incapable of managing her own affairs and absolutely dependent upon the bounty of the testator. In order to make it certain that such daughter may exist in comfort so long as she lives, the testator creates a trust of $500,000, bequeathing to the daughter the income thereon, payable yearly so long as she shall live, and at her death the capital fund to someone else. According to the Government's construction the son would receive his $500,000, his bequest, absolutely free from any tax. He would never pay any tax on it until and unless he used it so as to produce taxable income and duly reported the same. The daughter, however, who is absolutely dependent upon the amount received as her bequest, would be obliged to pay a tax on the legacy paid to her annually to the full limit provided by the law. There would be no escape on her part from such taxation and it could not be evaded in any way. There could not be a more direct tax. In addition, whatever part of her gift, if any, was not used in her support would in turn be taxable if it produced income.

Widows, orphans and dependents whose sole support is derived in the form of legacies paid annually so long as they live, created by a fund in the hands of trustees, in which fund they have no right and over which they have no control, are taxed to the utmost limit. They are taxed first by the inheritance and income tax laws of the

State (in New York these taxes are very high). They are again taxed (indirectly) by the Federal estate tax, and if the Government is correct their legacies are still further depleted by the direct tax levied on their income by the Government; and should that income—which, of course, is the legacy—in turn produce income, that is also taxed. The construction sought by the Government would bring about a discrimination and classification in substance, not in theory. Practically endless examples illustrating the truth of this could be given in addition to those which we have set forth above. It would be hard to imagine a more baseless classification, a more arbitrary discrimination.

The following quotation from the opinion of Mr. Justice Sutherland in *United States* v. *Merriam* (1923), 263 U. S. 179, 187, holding a bequest to be not taxable income under the 1913 Act, is appropriate:

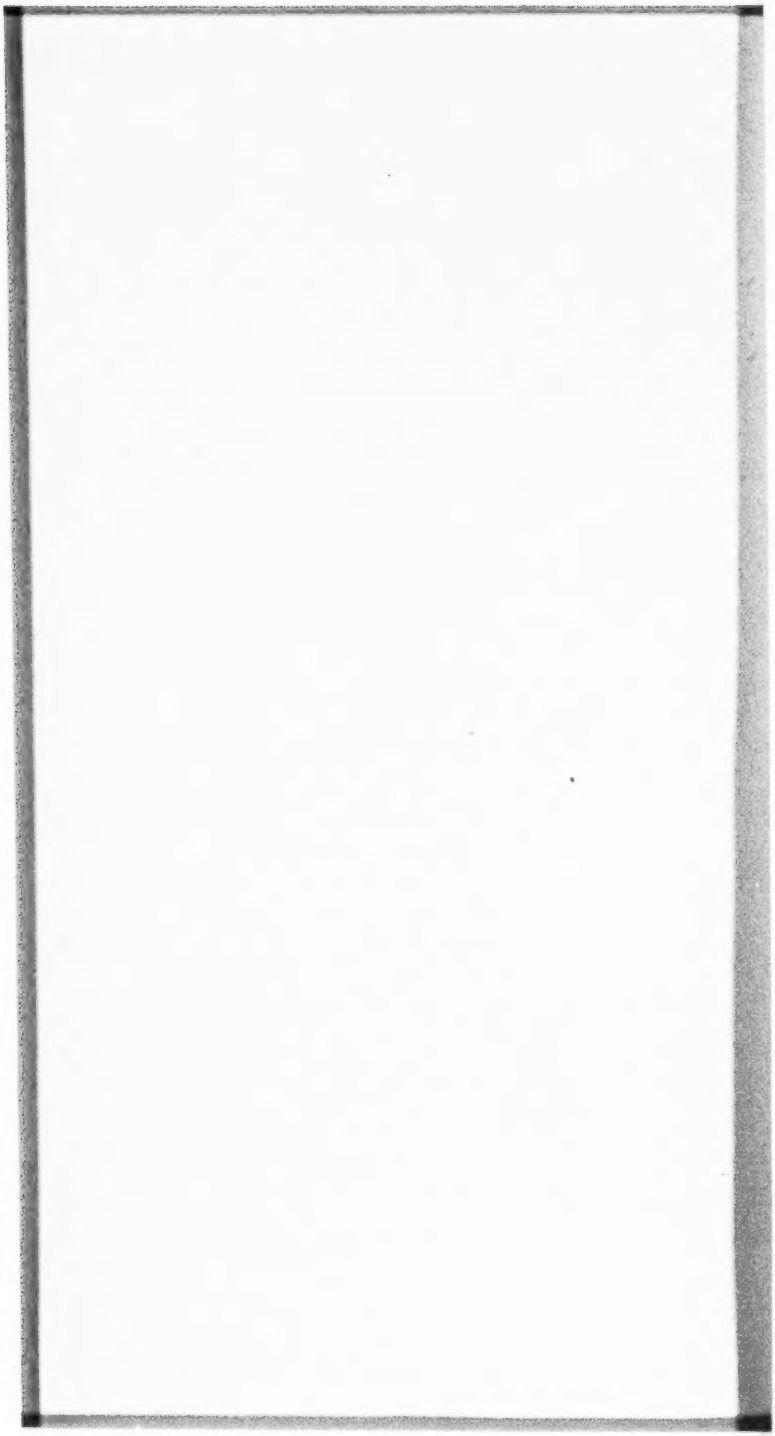
> "But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153. The rule is stated by Lord Cairns in Partington v. Attorney-General, L. R. 4 H. L. 100, 122:
>
> " 'I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in

any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.' And see *Eidman* v. *Martinez,* 184 U. S. 578, 583.

"We are of opinion that these bequests are not taxable as income under the statute, and the judgment below is affirmed."

Respectfully submitted,

JOHN W. DAVIS,
FRANK DAVIS, JR.,
Amici Curiae.



IRWIN, FORMER COLLECTOR OF INTERNAL REVENUE, *v.* GAVIT.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 325. Argued April 15, 1925.—Decided April 27, 1925.

1. A will provided that the income from a fund in trust should be applied to the education and support of the testator's granddaughter so far as the trustees deemed proper and that the balance of it should be divided into two equal parts one of which should be paid to the plaintiff in equal, quarter-yearly instalments during his life. On the granddaughter's reaching the age of twenty-one or dying, the fund was to go over, so that, considering her age, the plaintiff's interest could not exceed fifteen years. *Held*, that the sums paid the plaintiff were taxable income within the meaning of the Constitution, and of the Income Tax Act of October 3, 1913, which taxed "the entire net income arising or accruing * * * to every citizen of the United States" and defined net income as "gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise or descent." P. 166.
2. The provision of the above act exempting bequests assumes the gift of a corpus and contrasts it with the income arising from it, but was not intended to exempt income, properly so called, simply because of a severance between it and the principal fund. P. 167.
3. The rule that tax laws shall be construed favorably for the taxpayers is not a reason for creating or exaggerating doubts of their meaning. P. 168.

295 Fed. 84, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a judgment for the plaintiff in an action to recover taxes and penalties exacted under an income tax law. See 275 Fed. 643.

The *Solicitor General*, with whom *Mr. Chester A. Gwinn*, was on the brief, for petitioner.

The payments were income, taxable at normal and surtax rates under § II of the Income Tax Act of 1913. The

decision of this Court in the case of *Maguire* v. *Trefry*, 253 U. S. 12, directly refutes the contention that earnings of capital, in order to be income to the recipient within the meaning of the Income Tax Act of 1913 and the Sixteenth Amendment, must be a gain derived from a capital or corpus actually owned by the recipient of the income. *Merchants' Loan & Trust Co.* v. *Smietanka*, 255 U. S. 509. The error of the Circuit Court of Appeals lies in confusing the income from a legacy with the legacy itself. Under the act the former is taxed as income while the latter is not. What Gavit in fact took under Brady's will was a vested beneficial interest in the trust estate, enforceable in a court of equity, and which consisted of the right to receive, under certain conditions, a portion of the income. On this interest or use there was no tax because he received it as a bequest. On the other hand, what income Gavit received from the trustees of the estate was taxable. Gavit's interest in the trust fund was "property," the "value" of which is exempt from tax as income because received as a bequest. *Raymer* v. *Trefry*, 239 Mass. 410. The fact that the enjoyment is uncertain never interferes with the vesting of an estate. When the contingency is not in the person, but in the event when enjoyment shall commence, or in the time of the enjoyment, the interest is considered vested. *Neilson* v. *Bishop*, 45 N. J. Eq. 473.

"Income" from capital must be, not capital, but the proceeds of capital. A gift or bequest of capital assets even if payable in installments is not "income." Here not a portion of the capital assets forming the corpus, but certain of the earnings thereof, passed to the *cestui que trust*. The *cestui que trust* has an interest in the corpus, because he is legally entitled to receive whatever income is given him and must have the right to enforce payment if it is wrongfully withheld. The act of 1913 specifically taxes income "growing out of the ownership or use

of or interest in real or personal property." Therefore, it must inevitably follow that, as Gavit had an " interest in " the corpus, the proceeds thereof coming into his hands were taxable income. In denying that the *cestui que trust* had any interest in the principal the lower courts ignored the law of the State of New York as to trust estates. *Metcalfe* v. *Union Trust Company,* 181 N. Y. 39.

The most important aspect of the decision below is not the obvious error in this particular case, but the serious and far-reaching effect upon the whole income-tax system of the Government.

A Constitutional question is involved. The suggestion of the opinion below is that a bequest of income can not be " income " under the Sixteenth Amendment, where the beneficiary owns no part of the corpus, and is not made income by Congress calling it such. Under this theory Congress has no power to tax the income from property acquired by gift or legacy where income is bequeathed apart from the corpus; but under such circumstances both the value of the property itself and the income therefrom are necessarily exempt. The income from a legacy is taxable as income whether the legatee owns any part of the corpus or not. *Baltzell* v. *Casey,* 1 Fed (2) 29; aff'd. by C. C. A., Jan. 14, 1925. *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *Merchants' Loan & Trust Co.* v. *Smietanka, supra.* There is, and always has been, ample power in Congress to tax income from whatever source derived. Congress used the word " income " in its popular and broadest sense. *Eisner* v. *Macomber,* 252 U. S. 189; *Lynch* v. *Hornby,* 247 U. S. 339.

Mr. Neile F. Towner, for respondent.

The respondent was bequeathed a certain portion of the increase of the estate of the testator for a definite period; that is, until the granddaughter of the testator, who is the daughter of the respondent, attained the age of

twenty-one years. The gift to Mr. Gavit is further limited by the life of the granddaughter, as the will provided that if, prior to attaining the age of twenty-one, she died, respondent was to receive no further sum whatsoever under the will as the entire trust estate went to the issue of the granddaughter, if any, otherwise to the testator's issue. What, then, did Mr. Gavit receive from the estate? A legacy and a bequest are held to be synonymous terms and are properly used to distinguish a gift of personalty made by a testator from a devise which is a gift of realty. *In re Campbell's Estate*, 75 Pac. 851, 853. A bequest is a conditional or unconditional voluntary disposition of personal property by will. *Merriam* v. *United States*, 263 U. S. 179. Under these well recognized definitions, it can not be held that Mr. Gavit did not receive a gift or bequest. It is urged, however, that because, instead of receiving a definite sum or a definite portion of the corpus of the estate, he received a part of the increase, his gift ceased to be a legacy and became income. This contention we believe is unsound when we bear in mind that we are considering this proposition, not from the viewpoint of the estate or the testator's executors and trustees, but from the viewpoint of Mr. Gavit. There is ample authority for our contention that, so far as a beneficiary is concerned, the fact that the gift he received from a testator is measured by the increase of the corpus of the estate, does not change his position, and what he receives continues to be a legacy or bequest and he continues to be a legatee. *Disston* v. *McClain*, 147 Fed. 114; *United States* v. *Fidelity Trust Co.* 222 U. S. 158; *Westhus* v. *Union Trust Co.* 164 Fed. 795; *Matter of Stanfield*, 135 N. Y. 292.

Assume, for instance, in this case that the testator had directed one hundred and fifty thousand dollars to be paid to the respondent in fifteen annual installments which would be approximately the period in this case, there

could be no question but that such a gift would be considered as a bequest. Assume further, that the testator had divided his estate into six equal parts and directed his executors to pay to the respondent a portion of one of the parts in fifteen annual installments. In either case, as far as the beneficiary was concerned, he would be in receipt of a bequest and not income. This leads logically and directly to the present case, where the testator, instead of giving any part of the corpus of his estate to the respondent, directed that a certain percentage of the corpus should be set aside and that the respondent should receive a certain portion of the interest on that trust fund for a period limited. *Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602, distingushed. *Maguire* v. *Trefry,* 253 U. S. 12, distinguished. See *Knowlton* v. *Moore,* 178 U. S. 41.

A conclusive answer to the contention that, although this gift might not be income so far as the respondent himself was concerned, it was income so far as the estate was concerned, and hence taxable, is that the income of an estate was not taxable under the Act of 1913 where there was no person in receipt of such income, simply as income. *Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602.

Mr. Frank Davis and *Mr. John W. Davis* filed a brief as *amici curiae* by special leave of Court.

Mr. James Craig Peacock and *Mr. John W. Townsend* also filed a brief as *amici curiae* by special leave of Court.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover taxes and penalties exacted by the Collector under the Income Tax Act of October 3, 1913, c. 16, Section II, A. subdivisions 1 and 2; B. D. and

E. 38 Stat. 114, 166, *et seq.* The Collector demurred to the complaint. The demurrer was overruled and judgment given for the plaintiff by the District Court, 275 Fed. 643, and the Circuit Court of Appeals, 295 Fed. 84. A writ of certiorari was granted by this Court. 264 U. S. 579.

The question is whether the sums received by the plaintiff under the will of Anthony N. Brady in 1913, 1914 and 1915, were income and taxed. The will, admitted to probate August 12, 1913, left the residue of the estate in trust to be divided into six equal parts, the income of one part to be applied so far as deemed proper by the trustees to the education and support of the testator's granddaughter, Marcia Ann Gavit, the balance to be divided into two equal parts and one of them to be paid to the testator's son-in-law, the plaintiff, in equal quarterly payments during his life. But on the granddaughter's reaching the age of twenty-one or dying the fund went over, so that, the granddaughter then being six years old, it is said, the plaintiff's interest could not exceed fifteen years. The Courts below held that the payments received were property acquired by bequest, were not income and were not subject to tax.

The statute in Section II, A, subdivision 1, provides that there shall be levied a tax "upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States." If these payments properly may be called income by the common understanding of that word and the statute has failed to hit them it has missed so much of the general purpose that it expresses at the start. Congress intended to use its power to the full extent. *Eisner* v. *Macomber,* 252 U. S. 189, 203. By B. the net income is to include 'gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise or descent.'

By D. trustees are to make 'return of the net income of the person for whom they act, subject to this tax,' and by E. trustees and others having the control or payment of fixed or determinable gains, &c., of another person who are required to render a return on behalf of another are 'authorized to withhold enough to pay the normal tax.' The language quoted leaves no doubt in our minds that if a fund were given to trustees for A for life with remainder over, the income received by the trustees and paid over to A would be income of A under the statute. It seems to us hardly less clear that even if there were a specific provision that A should have no interest in the corpus, the payments would be income none the less, within the meaning of the statute and the Constitution, and by popular speech. In the first case it is true that the bequest might be said to be of the corpus for life, in the second it might be said to be of the income. But we think that the provision of the act that exempts bequests assumes the gift of a corpus and contrasts it with the income arising from it, but was not intended to exempt income properly so-called simply because of a severance between it and the principal fund. No such conclusion can be drawn from *Eisner* v. *Macomber,* 252 U. S. 189, 206, 207. The money was income in the hands of the trustees and we know of nothing in the law that prevented its being paid and received as income by the donee.

The Courts below went on the ground that the gift to the plaintiff was a bequest and carried no interest in the corpus of the fund. We do not regard those considerations as conclusive, as we have said, but if it were material a gift of the income of a fund ordinarily is treated by equity as creating an interest in the fund. Apart from technicalities we can perceive no distinction relevant to the question before us between a gift of the fund for life and a gift of the income from it. The fund is ap-

propriated to the production of the same result whichever form the gift takes. Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law. *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355. Day and night, youth and age are only types. But the distinction between the cases put of a gift from the corpus of the estate payable in instalments and the present seems to us not hard to draw, assuming that the gift supposed would not be income. This is a gift from the income of a very large fund, as income. It seems to us immaterial that the same amounts might receive a different color from their source. We are of opinion that quarterly payments, which it was hoped would last for fifteen years, from the income of an estate intended for the plaintiff's child, must be regarded as income within the meaning of the Constitution and the law. It is said that the tax laws should be construed favorably for the taxpayers. But that is not a reason for creating a doubt or for exaggerating one when it is no greater than we can bring ourselves to feel in this case.

Judgment reversed.

MR. JUSTICE SUTHERLAND, dissenting.

By the plain terms of the Revenue Act of 1913, the value of property acquired by gift, bequest, devise, or descent is not to be included in net income. Only the income derived from such property is subject to the tax. The question, as it seems to me, is really a very simple one. Money, of course, is property. The money here sought to be taxed as income was paid to respondent under the express provisions of a will. It was a gift by will,—a bequest. *United States* v. *Merriam,* 263 U. S. 179, 184. It, therefore, fell within the precise letter of the statute; and, under well settled principles, judicial inquiry may go no further. The taxpayer is entitled to the

rigor of the law. There is no latitude in a taxing statute,—you must adhere to the very words. *United States* v. *Merriam, supra,* pp. 187–188.

The property which respondent acquired being a bequest, there is no occasion to ask whether, before being handed over to him, it had been carved from the original corpus of, or from subsequent additions to, the estate. The corpus of the estate was not the legacy which respondent received, but merely the source which gave rise to it. The money here sought to be taxed was not the fruits of a legacy; it was the legacy itself. *Matter of Stanfield,* 135 N. Y. 292, 294.

With the utmost respect for the judgment of my brethren to the contrary, the opinion just rendered, I think without warrant, searches the field of argument and inference for a meaning which should be found only in the strict letter of the statute.

Mr. JUSTICE BUTLER concurs in this dissent.